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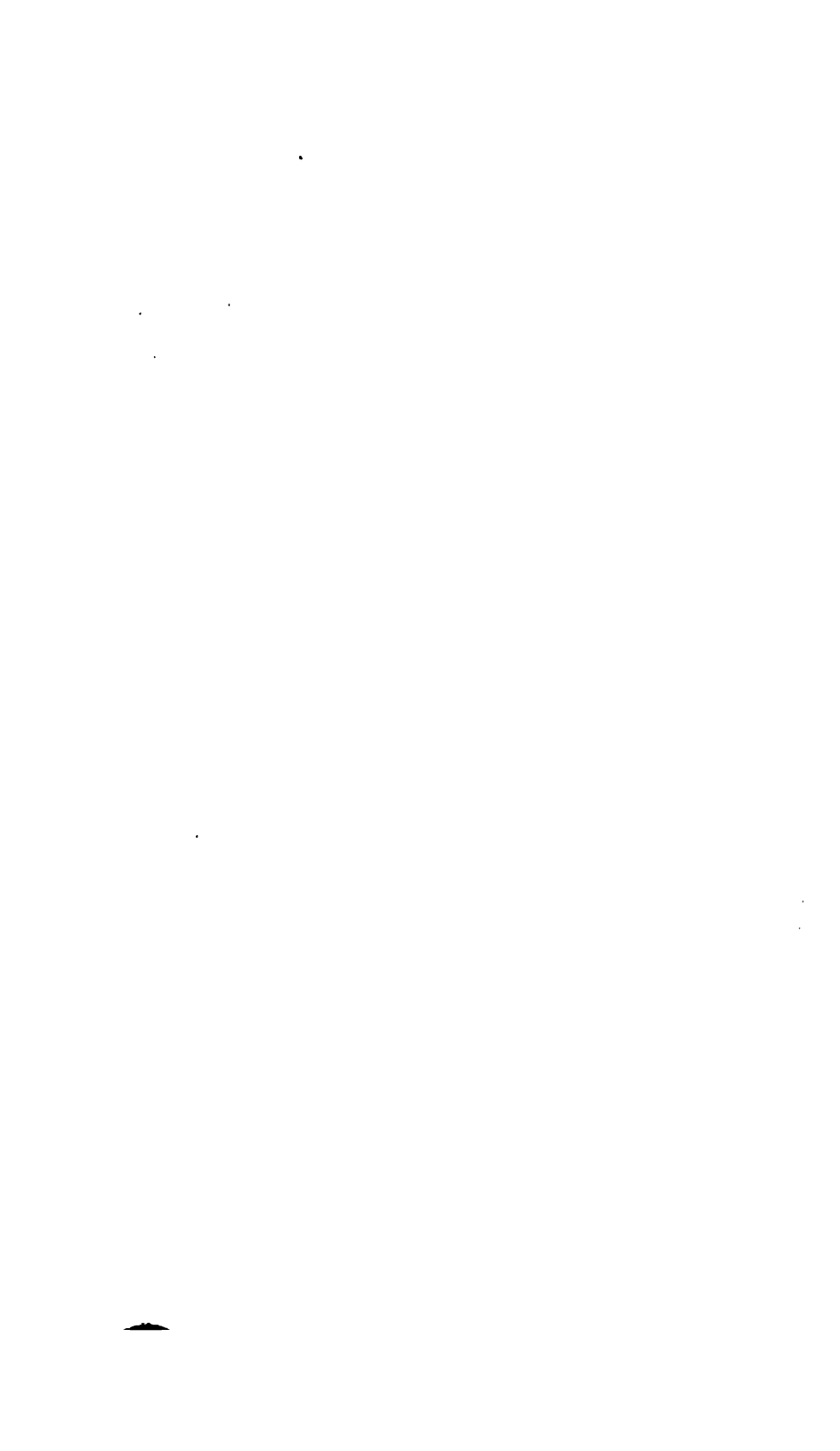
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**THE**  
**PROCEEDINGS IN AN ACTION**

**IN THE**  
**QUEEN'S BENCH, COMMON PLEAS, AND**  
**EXCHEQUER DIVISIONS**

**OF THE**  
**HIGH COURT OF JUSTICE.**

**BY**  
**SAMUEL PRENTICE, ESQ.,**  
**OF THE MIDDLE TEMPLE, ONE OF HER MAJESTY'S COUNSEL.**

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## PREFACE.

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IN this work (which has been written principally for the use of students, but which, it is hoped, will also be found serviceable to practitioners), is given a view or outline of an action in the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice; and it must be borne in mind that most of what is here written applies to actions in the Chancery Division of the High Court, where that division and the other divisions above mentioned have concurrent jurisdiction.

The Common Law Procedure Acts reformed and altered in many respects the mode of pleading and procedure in actions in the Superior Courts of Common Law; but the Judicature Acts have entirely altered and changed the system of pleading and procedure.

Some of the greatest changes made by the Judicature Acts are the following:—the superior courts have been united, and constitute one supreme court of judicature;—a new court of appeal has been established, called Her Majesty's Court of Appeal;—the judicial strength of the House of Lords has been increased by the creation of two Lords of Appeal in ordinary, and provisions have been made as to hearing appeals to the House during a proroga-

tion or dissolution of Parliament ;—district registries have been established, where writs of summons for the commencement of actions may be issued, and certain proceedings in actions may be taken ;—law and equity are to be concurrently administered, and generally, except in certain specified cases, where the rules of equity and of the common law are in conflict, the rules of equity are to prevail ;—defendants can make counter-claims against plaintiffs, instead of bringing cross-actions ;—unliquidated damages can be made the subject of set-off ;—the system of pleading formerly in use in the common law courts has been entirely altered ;—third parties interested or affected by the result of an action can in some cases be made parties to it ;—assessors can be appointed and assist at a trial ;—costs in general are in the discretion of the court, except in cases tried before a jury, in which case even it may be said they are virtually so ;—a more extensive right of appeal has been given, and the mode of appealing much simplified. Besides the above, minor improvements have been made—thus provisions have been made as to numerous parties suing and being sued ;—as to adding and striking out the names of plaintiffs and defendants ;—and a writ of *scire facias*, or a writ of revivor, or a suggestion, is now no longer necessary when the time has elapsed for issuing execution on a judgment, or when some party other than a party to the action is entitled or liable to the execution, &c., &c.

There is considerable difficulty in writing upon the present practice, as it is often difficult to say whether or

not the old practice, (which where not altered still remains,) has been abolished or altered. Although at the present, as was to be expected, there has been some confusion, it is anticipated that ere long the Judicature Acts will be found to have effected very great improvements—that they will remedy some of the grievances of which suitors complain—and render the administration of justice less uncertain and more expeditious.

S. PRENTICE.

4, ESSEX COURT, TEMPLE,  
*Sept.* 1877.





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**PART I.**  
**SUPREME COURT OF JUDICATURE, &c.**

---

**CHAPTER I.**

SUPREME COURT OF JUDICATURE.

THE Supreme Court of Judicature Acts have consolidated into one court the superior courts and have made many great alterations in the mode of proceeding in an action. It is most important that practitioners and students should make themselves familiar with these acts, and the procedure established thereunder. We purpose in this work to show the present mode of proceeding in an action in the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice; and what is herein stated will for the most part apply to actions in the Chancery Division of such court brought in respect of causes and matters not specially assigned to such division as presently mentioned.

An action has been defined to be the form prescribed by law for the recovery of one's due, or the lawful demand of one's right. In the Judicature Acts it means a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court; and does not include a criminal proceeding by the Crown. (J. A. 1873, s. 100.)

PART I. By O. 1, r. 1 (a), all actions which have hitherto been commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which have hitherto been commenced by bill or information in the High Court of Chancery, or by a cause *in rem* or *in personam* in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, must be instituted in the High Court of Justice by a proceeding to be called an action.

Juris-  
diction of  
Superior  
Courts be-  
fore J. A.

Court of  
Chancery.

At the time of the passing of the Judicature Acts, the High Court of Chancery had both a common law and equitable jurisdiction. Within the space allowed to us we can only give a very general outline of the jurisdiction of this court. It had jurisdiction in the causes and matters assigned to the Chancery Division of the High Court of Justice by the 34th section of the Judicature Act, 1873, noticed post, p. 8, and in other matters. The jurisdiction exercised by the Court of Chancery might be considered in some cases as assistant to, in some concurrent with, and in others exclusive of the jurisdiction of courts of common law. It exercised jurisdiction in most cases of fraud, accident, mistake, account, partition, dower, and in compelling specific performance of agreements. It protected and took care of infants, and claimed an exclusive jurisdiction in most matters of trust and confidence, and wherever upon the principles of universal justice the interference of a court of judicature was necessary to prevent a wrong and the positive law was silent. The Lord Chancellor and Lords Justices of Appeal in Chancery had also certain jurisdiction in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind.

Queen's  
Bench,  
Common  
Pleas,  
and Ex-  
chequer.

At the time of the passing of the above Acts, there were three superior courts of common law, the Queen's Bench, the Common Pleas, and the Exchequer of Pleas. They had concurrent jurisdiction in all personal actions and ejectment. Their jurisdiction extended throughout all England, the Principality of Wales, and the town of Berwick-upon-Tweed. It did not extend to Scotland or Ireland. The Court of Queen's Bench was the supreme court of common law in the kingdom, consisting of a chief justice and puisne justices, who were by their office the sovereign conservators of the peace, and supreme coroners of the

(a) The orders and rules in the schedule to the Judicature Act, 1875, are referred to thus: O. 1, r. 1—O. 2, r. 1, &c. The numbers of the orders and rules being the same as in the schedule.



land. This court had exclusive jurisdiction in proceedings upon prerogative writs of *mandamus* and *quo warranto*. It had also a peculiar jurisdiction in all criminal proceedings. In fact it was said to be the principal court of criminal jurisdiction known to the laws of England. The Court of Common Pleas had, at the time of the passing of the Common Law Procedure Act, 1860, exclusive jurisdiction in the writs of right of dower, dower *unde nihil habet* and *quare impedit*. By the 26th section of that Act, these writs were abolished, and actions to be commenced by writ of summons in the Court of Common Pleas were substituted in lieu thereof. Appeals laid to this court against the decision of a barrister appointed to revise the list of persons entitled to vote in the election of members of parliament. It also exercised jurisdiction in Parliamentary and Municipal election petitions, 31 & 32 Vict. c. 125, 35 & 36 Vict. c. 60. The Court of Exchequer had exclusive jurisdiction in certain matters which concerned the Queen's profit and revenue. The 5 Vict. c. 5 took away, except in revenue cases, its equitable jurisdiction which it formerly possessed: *Attorney-General v. Halling*, 15 M. & W. 687.

The High Court of Admiralty had jurisdiction to try all maritime causes, that is to say causes in respect of injuries committed on the High Seas, and generally, except where otherwise provided by statute, all admiralty causes must have arisen wholly upon the sea and not within the precincts of any county: 13 R. 2, c. 5; 15 R. 2, c. 3 (a). This court had jurisdiction in certain matters respecting ships, in salvage cases, seamen's wages, &c. There were several statutes affecting the jurisdiction and practice of this court and in particular 3 & 4 Vict. c. 65, and the 24 & 25 Vict. c. 10, which extended the jurisdiction and improved the practice of this court, and made it a court of record. This latter statute gave the court jurisdiction over any claim for damages done by any ship, and in certain matters respecting ships (b) and their cargoes, and mortgages of ships;—in cases of seamen's wages, ships' disbursements and necessities supplied for ships (b), and extended the court's jurisdiction in salvage and other

(a) As to jurisdiction on claims of salvage and wreck, see 3 & 4 Vict. c. 65; 9 & 10 Vict. c. 99; 17 & 18 Vict. c. 104, ss. 460, 464, 468, 476, 492—498. As to prize of war, see Chit. Gen. Practice, 538 a; 1 Doug. 594. As to booty of war, see the *Banda* and *Kirwee Booty*, L. R. 1 Ad. and Ex. 109—269.

(b) See also 3 & 4 Vict. c. 65.

## PART I.

cases. The jurisdiction conferred by this Act might be exercised either by proceedings *in rem* or *in personam* (Williams & Bruce's Admiralty Practice). This method of proceeding *in rem* was peculiar to this court, and generally it was in order to avail themselves of the advantages thus afforded that suitors resorted to it.

Her  
Majesty's  
Court of  
Probate.

By 20 & 21 Vict. c. 77, amended by subsequent statutes, Her Majesty's Court of Probate was established. This court had jurisdiction and authority in relation to the granting or revoking probates of wills and letters of administration of the effects of deceased persons, &c.

Court for  
Divorce  
and Matrimonial  
Causes.

"The Court for Divorce and Matrimonial Causes," was established by the 20 & 21 Vict. c. 85, which has been amended by several subsequent Acts of Parliament. This court had jurisdiction in all causes, suits, and matters matrimonial, except in respect of marriage licenses, and had power to decree a dissolution of marriage, a judicial separation; to declare a marriage to be null and void; and to order a restitution of conjugal rights, &c. By the 21 & 22 Vict. c. 93, persons might apply to this court for declarations of legitimacy;—for declarations of the validity of certain marriages, and for declarations that they were natural born subjects of the realm.

Supreme  
Court of  
Judicature.

By the Judicature Act, 1873, s. 3 (amended by the Judicature Act, 1875, s. 9), the High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, are united, and constitute one Supreme Court of Judicature. This court consists of two permanent divisions, one of which is called her Majesty's High Court of Justice, and is treated of in the next chapter; and the other is called her Majesty's Court of Appeal, the constitution and jurisdiction of which is shown in chapter xxvii.

The London Court of Bankruptcy is not consolidated with the Supreme Court: J. A. 1875, s. 9 (a).

(a) See *ex parte Ditton re Woods*, 45 L. J. B. 87. An appeal lies from the London Court of Bankruptcy to Her Majesty's Court of Appeal, (J. A., 1875, s. 9.)

## CHAPTER II.

## HER MAJESTY'S HIGH COURT OF JUSTICE.

ONE of the divisions of the Supreme Court established by the High Court the Judicature Acts, under the name of "Her Majesty's High Court of Justice," has original jurisdiction with certain appellate jurisdiction from inferior courts. By the Judicature Act, 1873, s. 5 (amended by the Judicature Act, 1877), there are twenty-three (*a*) judges of this court: viz., the Lord Chancellor (*b*), the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and other judges who are now styled Justices of the High Court (J. A. 1877, s. 4). (*c*) Amongst these judges are some of the former judges of the superior courts, including some of the former Vice-Chancellors of the Court of Chancery, the former judge of the Court of Probate, and of the Court for Divorce and Matrimonial Causes, and the judge of the High Court of Admiralty. It is not necessary that a person appointed a judge of the High Court or Court of Appeal should be a Serjeant-at-Law. Before this Act, it was the practice to make only Serjeants-at-Law judges of the Courts of Queen's Bench, Common Pleas, and Exchequer. The High Court and Court of Appeal are duly constituted, notwithstanding any vacancy in the office of any judge thereof (J. A. 1873, ss. 7, 8).

By the Judicature Act, 1873, s. 11, every existing judge, who is by this Act made a judge of the High Court of Justice or an ordinary judge of the Court of Appeal, shall, as to tenure of office, rank (*d*), title, salary, pension, patronage,

(*a*) By Judicature Act, 1876, s. 18, two additional judges may be appointed on certain events happening.

(*b*) By Judicature Act, 1875, s. 3, the Lord Chancellor is not to be deemed a permanent judge of the High Court, and the above provisions in s. 5, relating to the appointment and style of the judges of the High Court do not apply to the Lord Chancellor. The Lord Chief Justice of England is president of the High Court in the absence of the Lord Chancellor.

(*c*) It seems that a judge of the High Court who was a Baron of the Exchequer when the Judicature Act, 1873, came into operation, and a Vice-Chancellor who was such at that time, must be styled a Justice of the High Court (J. A. 1877, s. 4).

(*d*) As to the judge of the Court of Admiralty, see Judicature Act, 1875, s. 8.

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and powers of appointment or dismissal, and all other privileges and disqualifications, remain in the same condition as if this Act had not passed; and, subject to the change effected in their jurisdiction and duties by or in pursuance of the provisions of this Act, each of the said existing judges shall be capable of performing and liable to perform all duties which he would have been capable of performing or liable to perform in pursuance of any Act of parliament, law, or custom if this Act had not passed. No judge appointed before the passing of this Act shall be required to act under any Commission of Assize, Nisi Prius, Oyer and Terminer, or Gaol Delivery, unless he was so liable by usage or custom at the commencement of this Act. Therefore none of the Equity judges, nor the judges of the Probate, Divorce, and Admiralty Courts, who were such at the time of the coming into operation of the Judicature Acts, will be so required (a).

By the Judicature Act, 1875, s. 5, all the judges of the High Court, and of the Court of Appeal, with the exception of the Lord Chancellor, hold their offices during good behaviour, subject to a power of removal by her Majesty, on an address presented to her Majesty by both Houses of Parliament. No judge of either of the said courts can sit in the House of Commons. A judge of either of the said courts is addressed in court, or at judges' chambers, as "My Lord."

By the Judicature Act, 1875, s. 6, the judges of the High Court of Justice, who are not also judges of the Court of Appeal, rank next after the judges of the Court of Appeal, and among themselves (subject to certain provisions as to existing judges) according to the priority of their respective appointments.

As to the powers of judges on circuit, see s. 29 of the J. Act, 1873, *post*, p. 19.

Jurisdiction of Court.

By the Judicature Act, 1873, s. 16, the High Court of Justice is a superior Court of Record, and, subject as in the Acts mentioned, there is vested in such court the jurisdiction which, at the commencement of the Judicature Acts, was vested in, or capable of being exercised by, all or any of the courts following; (that is to say,)

1. The High Court of Chancery, as a Common Law Court, as well as a Court of Equity (b) including the jurisdiction of the Master of the Rolls, as a judge or master of

(a) As to future judges, see J. Act, 1875, s. 8.

(b) *Nicholas v. Dracachis*, 45 L. J. Prob. 45.

the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a Common Law Court. CHAP. II.

2. The Court of Queen's Bench (a).
3. The Court of Common Pleas at Westminster (a).
4. The Court of Exchequer, as a Court of Revenue, as well as a Common Law Court (a).
5. The High Court of Admiralty.
6. The Court of Probate.
7. The Court for Divorce and Matrimonial Causes.
9. The Court of Common Pleas at Lancaster.
10. The Court of Pleas at Durham.
11. The Courts created by Commissions of Assize, of Oyer and Terminer, and of Gaol Delivery, or any of such Commissions. (See *post*, p. 18.)

The jurisdiction transferred to the High Court of Justice includes (subject to the exceptions contained in the Act) the jurisdiction which, at the commencement of the same, was vested under any law or custom in any one or more of the judges of the said courts, respectively, sitting in court or elsewhere (b).

The London Court of Bankruptcy is not consolidated with the Supreme Court of Judicature, and the jurisdiction of that court is not transferred to the High Court of Justice. The Court of Bankruptcy has jurisdiction to restrain proceedings in the High Court of Justice, *Ex parte Ditton, re Woods*, 45 L. J. B. 87.

By the Judicature Act, 1873, s. 17, there shall not be transferred to, or vested in, the said High Court of Justice by virtue of this Act:—

1. Any appellate jurisdiction of the Court of Appeal in Chancery, or of the same court sitting as a Court of Appeal in Bankruptcy.
2. Any jurisdiction of the Court of Appeal in Chancery of the County Palatine of Lancaster.
3. Any jurisdiction usually vested in the Lord Chancellor or in the Lords Justices of Appeal (c) in Chancery, or either of them, in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind.
4. Any jurisdiction vested in the Lord Chancellor in relation

(a) See *ante*, p. 2.

(b) By J. Act, 1873, s. 76, acts of parliament relating to transferred courts are to be read as applying to courts under this act.

(c) See the J. Act, 1875, s. 7.

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to grants of letters patent, or the issue of commissions, or other writings, to be passed under the Great Seal of the United Kingdom.

5. Any jurisdiction exercised by the Lord Chancellor in right of, or on behalf of, Her Majesty, as visitor of any college, or of any charitable or other foundation.
6. Any jurisdiction of the Master of the Rolls in relation to records in London, or elsewhere in England.

How jurisdiction exercised.

The jurisdiction of the High Court of Justice is exercised (so far as regards procedure and practice) in the manner provided by the Acts, and by the rules and orders of court, made in pursuance thereof, and where no special provision is contained therein with reference thereto, it is exercised as nearly as may be in the same manner as the same might have been exercised by the respective courts from which such jurisdiction has been transferred, or by any of such courts (J. A. 1873, s. 23 : O. 1, r. 3). Ss. 22 and 42 of the Judicature Act, 1873, make provisions for the procedure in matters and proceedings pending at the commencement of the Act, which it is thought unnecessary further to notice : *Lloyd v. Lewis*, 46 L. J. Ch. 81.

Divisions of Court.

For the more convenient despatch of business in the said High Court, there are five divisions thereof. These are called respectively, the Chancery Division, the Queen's Bench Division, the Common Pleas division, the Exchequer division, and the Probate, Divorce, and Admiralty Division.

The Chancery Division consists of the Lord Chancellor, who is president thereof, the Master of the Rolls, and four other judges. The Queen's Bench Division consists of the Lord Chief Justice of England, who is president thereof, and four other judges. The Common Pleas Division consists of the Lord Chief Justice of the Common Pleas, who is president thereof, and of four other judges. The Exchequer Division consists of the Lord Chief Baron of the Exchequer, and four other judges. The Probate, Divorce, and Admiralty Division consists of two judges, one of them who was formerly the judge of the Court of Probate is the president thereof. The High Court being thus divided does not prevent a judge of one division from acting in another, or for a judge of another (J. A. 1873, ss. 31, 32).

Distribution of business amongst divisions.

Causes and matters are distributed among the divisions and judges of the High Court in the manner determined by the rules of court and orders of transfer ; and in the meantime and subject thereto causes and matters are assigned to the said divisions as hereafter mentioned (J. A. 1873, s. 33). By the Judicature Act, 1873, s. 34, there shall be assigned

(subject as aforesaid) to the Chancery Division of the said court :—(1.) All causes and matters pending in the Court of Chancery at the commencement of this Act. (2.) All causes and matters to be commenced, after the commencement of this Act, under any Act of Parliament by which exclusive jurisdiction, in respect to such causes or matters, has been given to the Court of Chancery, or to any judges or judge thereof, respectively, except appeals from the County Court. (3.) All causes or matters for any of the following purposes : The administration of the estates of deceased persons ; the dissolution of partnerships, or the taking of partnership or other accounts ; the redemption or foreclosure of mortgages ; the raising of portions, or other charges on land ; the sale and distribution of the proceeds of property subject to any lien or charge ; the execution of trusts, charitable or private ; the rectification, or setting aside, or cancellation of deeds or other written instruments ; the specific performance of contracts between vendors and purchasers of real estates, including contracts for leases ; the partition or sale of real estates ; the wardship of infants, and the care of infant estates.

There shall be assigned (subject as aforesaid) to the Queen's Bench Division of the said court :—(1.) All causes and matters, civil and criminal, pending in the Court of Queen's Bench at the commencement of this Act. (2.) All causes and matters, civil and criminal, which would have been within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction if this Act had not passed.

There shall be assigned (subject as aforesaid) to the Common Pleas Division of the said court :—(1.) All causes and matters pending in the Court of Common Pleas at Westminster, the Court of Common Pleas at Lancaster, and the Court of Pleas at Durham, respectively, at the commencement of this Act. (2.) All causes and matters which would have been within the exclusive cognizance of the Court of Common Pleas at Westminster, if this Act had not passed.

There shall be assigned (subject as aforesaid) to the Exchequer Division of the said court :—(1.) All causes and matters pending in the Court of Exchequer at the commencement of this Act. (2.) All causes and matters which would have been within the exclusive cognizance of the Court of Exchequer, either as a Court of Revenue, or as a Common Law Court, if this Act had not passed.

There shall be assigned (subject as aforesaid) to the Probate, Divorce, and Admiralty Division of the said High

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Court :—(1.) All causes and matters pending in the Court of Probate, or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, at the commencement of this Act. (2.) All causes and matters which would have been within the exclusive cognizance of the Court of Probate, or the Court for Divorce and Matrimonial Causes, or of the High Court of Admiralty, if this Act had not passed.

By the Judicature Act, 1875, s. 11, subject to the rules of court and Judicature Acts, and to the power of transfer, every person by whom any cause or matter is commenced in the High Court of Justice, which would have been within the non-exclusive cognizance of the High Court of Admiralty if the Judicature Act had not passed (see O. 5, r. 4 : *Humphrey v. Edwards*, 45 L. J. Ch. 112), must assign the same to one of the said divisions as he may think fit, by marking the document by which the same is commenced with the name of such division, and giving notice thereof to the proper officer of the court. Notice of an action being assigned to a particular division is sufficiently given by leaving with the officer a copy of the writ of summons (O. 5, r. 9); but all steps and proceedings in or before the said High Court in any cause or matter subsequent to the commencement thereof, must be taken (subject to the Rules of Court and to the power of transfer) in the division to which such cause or matter is for the time being attached (*Garbutt v. Fawcus*, 45 L. J. Ch. 133). If a plaintiff or petitioner assign his cause or matter to a division to which the same ought not to be assigned, the court, or any judge of such division, upon being informed thereof, may, on a summary application at any stage of the cause or matter, direct the same to be transferred to the division to which the same ought to have been assigned, or he may, if he think it expedient so to do, retain (a) the same in the division in which the same was commenced. All steps and proceedings taken in any such cause or matter, and all orders made therein before any such transfer are valid.

Transfer of action from one division to another.

By O. 51, r. 1, an action may be transferred from one division to another, or from one judge of the Chancery Division (b) to another judge thereof, by an order of the Lord Chancellor (c), but no transfer is to be made from or to any division without the consent of the president thereof.

(a) See the Judicature Act, 1875, s. 36 ; see *post* p. 11.

(b) See O. 51, May, 1877.

(c) *Re Hutley*, 45 L. J. Ch. 79.



So by O. 51, r. 2, an action may, at any stage, be transferred from one division to another by an order made by the court or any judge (a) of the division to which the action is assigned; but no such transfer can be made without the consent of the president of the division to which the action is proposed to be transferred. A motion to the court for a transfer under this rule should be made on notice (*Humphreys v. Edwards*, 45 L. J. Ch. 112). Where, in an action for the possession of land, a counter claim for the specific performance of an agreement for a lease is made, it seems the action ought to be transferred to the Chancery Division on a *prima facie* case for specific performance being made out. (*Hillman v. Mayhew*, 45 L. J. Ex. 334.) An action brought in the Chancery Division will not be transferred, because it is merely an action for damages. (*Cannot v. Morgan*, 45 L. J. Ch. 50.)

By r. 18, 26th June, 1876, when an order has been made by a judge of the Chancery Division for the winding-up of a company under the Companies Acts, 1862 and 1869, or for the administration of the assets of a testator or intestate, the judge in whose court such winding-up or administration is pending has power to order the transfer to such judge of any action pending in any other division brought or continued by or against such company, or the executors or administrators of such testator or intestate.

By O. 51, r. 3, an action transferred to the Chancery Division or the Probate Division, must, by the order directing the transfer, be directed to be assigned to one of the judges of such division to be named in the order.

(a) See *Hillman v. Mayhew*, 45 L. J. Ex., 334.

## CHAPTER III.

## THE OFFICERS OF THE COURT.

- PART I.** SECTION 77, and subsequent sections of the Judicature Act, 1873 (amended by the Judicature Act, 1875, ss. 27, 34, 35), contain provisions for the transfer of certain then existing officers to the Supreme Court, and as to their duties, &c. (see O. 60, r. 1). This order provides for officers attached to a division following the appeals therefrom, and states what duties they shall perform with reference to such appeals. By the Judicature Act, 1873, s. 84, the authority of the Supreme Court over its officers may be exercised in and by the High Court and the Court of Appeal respectively; and also, in the case of officers attached to any division of the High Court, by the president of such division, with respect to any duties to be discharged by them respectively.
- Officers of the Court.** The Masters, who are officers of the court (1 Vict. c. 30), have many duties imposed on them. They attend the court when sitting, tax costs, examine witnesses before trial under 1 W. 4, c. 22, s. 4, and the Common Law Procedure Act, 1854, and transact certain business at chambers which was formerly transacted by a judge: 30 & 31 Vict. c. 68. Causes and matters are also referred to them under the Common Law Procedure Act, 1854, and otherwise.
- The Masters.** Counsel have exclusive audience in the courts; but solicitors have audience at the judge's chambers. The parties to an action can themselves, as a general rule, conduct their own cases, and make applications to the court or a judge in matters in which they are interested. A counsel can maintain no action for his fees, which are given not as *locatio vel conductio*, but as *quiddam honorarium*, not as salary or hire, but as a mere gratuity. Even a promise by a client to pay money to a barrister has no binding effect: *Kennedy v. Brown*, 32 L. J. C. P. 137. As to a counsel's authority to bind his client, see *Swinfen v. Lord Chelmsford*, 29 L. J. Ex. 382.
- Counsel.** Persons formerly called solicitors, attorneys, and proctors, are now called solicitors. They are admitted, subject to certain
- Solicitors.**

regulations (a), by the Master of the Rolls, and are officers CHAP. III.  
 of the Supreme Court; and that court and the High Court of Justice and the Court of Appeal respectively, or any division or judge thereof, may exercise the same jurisdiction in respect of such solicitors as any one of Her Majesty's superior courts of law or equity might previously to the passing of the Judicature Acts have exercised in respect of any solicitor or attorney admitted to practise therein. (J. A. 1873, s. 87; J. A. 1875, s. 14) (b). A solicitor is amenable to the jurisdiction of the court in respect of matters done by him *as a solicitor*. In respect of such matters he may be punished by the court for misconduct, or compelled to perform his duties or undertakings.

The sheriffs are for some purposes officers of the court, Sheriffs. and certain writs are directed to and have to be executed by them. When the sheriff is an interested party, a writ which would be directed to him if he were not interested is directed to the coroner; or if he also is interested, to certain persons appointed by the court called *elisors*. The 1 Vict. c. 55, relates to the fees of sheriffs and their officers, and gives the court certain powers with respect to same.

Certain fees are taken in the courts and offices. The Fees. Lord Chancellor, with the advice and consent of the judges of the Supreme Court, or any three of them, and with the concurrence of the Treasury, may fix and alter the fees to be taken in the courts. These fees are generally taken by stamps which are impressed or adhesive, as the Treasury from time to time directs. (J. A. 1875, s. 26; O. 22, April, 1876.) By J. Act, 1875, s. 26, a document which ought to bear such a stamp, must not be received, filed, used, or admitted in evidence unless it is properly stamped within the prescribed time; but if any such document is through mistake or inadvertence received, filed, or used without being properly stamped, the Lord Chancellor or the court may, if he or it shall think fit, order that the same be stamped as in such order may be directed.

(a) See 40 & 41 Vict. c. 25, as to the examination of persons applying to be admitted solicitors.

(b) See 37 & 38 Vict. c. 68, which gives a summary remedy against a person wrongfully acting as a solicitor, &c.. The Law List is evidence of a person named therein as a solicitor being so, 23 & 24 Vict. c. 127, s. 22.

## CHAPTER IV.

## SITTINGS OF THE COURTS.

**PART I.** **Sittings of Courts.** BEFORE the passing of the Judicature Acts it was the practice for four judges to sit in banco in each of the Courts of Queen's Bench, Common Pleas, and Exchequer, for the purpose of determining the business of the court, and one judge sometimes sat by himself in court for the purpose of determining points of practice and trifling matters. For some short time before the Judicature Acts each of these courts sat sometimes in two divisions at one time in banco : two judges usually sitting in the second division. This practice has, however, been altogether altered by the Judicature Acts.

**One judge constitutes a court.** By the Judicature Acts, one judge sitting in court constitutes a court (J. A. 1873, s. 39) (*a*). And by the Judicature Act, 1876, s. 17, every action and proceeding in the court, and all business arising out of the same, except as in the Act provided, must, so far as is practicable and convenient, be disposed of before a single judge, and all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order, must, so far as is practicable and convenient, be taken before the judge before whom the hearing or trial took place (*b*). If for any reason it is impossible or inconvenient that such judge should act in the matter, the president of the division to which the action belongs may either by a special order in the action or matter, or by a general order applicable to any class of actions or matters, nominate some other judge to do so (r. 9, 7 Nov. 1876).

**Divisional Courts.** Divisional courts are held for the transaction of certain business ordered by rules of court to be heard by same. In general a divisional court is constituted of two judges and no more. But a greater number of judges may sit in a divisional court with the concurrence of certain judges

(*a*) But the expression "the court or a judge," in the rules and orders, invariably means a divisional court or a judge at chambers: *Baker v. Oakes*, 46 L. J. Q. B., 247.

(*b*) See Judicature Act, 1873, s. 46.

as mentioned in this Act (J. A. 1876, s. 17). The decisions CHAP. IV. of a divisional court are not invalidated by reason of its being improperly constituted of a greater number than two judges. Any number of divisional courts may sit at the same time (J. A. 1873, s. 40); and every judge of the High Court is qualified to sit in any divisional court. (*id.*)

The following matters are heard and determined before divisional courts:—

Proceedings on the Crown side of the Queen's Bench Division.

Appeals from Revising Barristers, and proceedings relating to Election Petitions, parliamentary and municipal.

Appeals under section 6 of the County Courts Act, 1875.

Proceedings on the Revenue side of the Exchequer Division.

Proceedings directed by any Act of Parliament to be taken before the court, and in which the decision of the court is final.

Cases stated by the Railway Commissioners under the 36 & 37 Vict. c. 48.

Cases of Habeas Corpus, in which a judge directs that a rule *nisi* or the writ be made returnable before a divisional court.

Special cases where all parties agree that the same be heard before a divisional court.

Appeals from Chambers in the Queen's Bench, Common Pleas, and Exchequer Divisions, and applications for new trials in the said division where the action has been tried with a jury (r. 8, Dec. 1876) (*a*). All business formerly disposed of in banc, may, subject as above, now be disposed of by divisional courts (J. A. 1873, s. 41).

Subject to any arrangement which may be from time to time made by mutual agreement between the judges of the Trials by jury. High Court, the sittings for trial by jury in London and Middlesex are held by and before the judges of the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court.

Anciently the courts of law sat in what was called term Time when sittings take place. time only, and all legal proceedings took place, or were supposed to take place, during such time. There were four terms in each year: Hilary, Easter, Trinity, and Michaelmas. The commencement and duration of these terms at the time the Judicature Acts took effect were fixed by the

(*a*) This does not take away or limit the powers a single judge had to hear and determine any such matters.

PART I. 11 Geo. 4 & 1 W. 4, c. 70, s. 6, and 1 W. 4, c. 3, s. 3. Hilary Term commenced 11th January, and ended 31st January; Easter Term commenced 15th April, and ended 8th May; Trinity Term commenced 22nd May, and ended 12th June; Michaelmas Term commenced 2nd November, and ended 25th November. If the term would end on Sunday, Monday was substituted; and if any of the days between the Thursday before and the Wednesday after Easter day fell within Easter Term, there were no sittings in banc on those days, but Easter Term was prolonged, and the commencement of Trinity Term postponed for an equal number of days.

At the time the Judicature Acts took effect, by different statutes the courts of law could sit in banco for the determination of questions of law, and could also try issues of fact at certain times after term, and most proceedings at law could be taken after term, except during the Long Vacation, *i.e.*, between the 10th of August and the 24th October, during which time only certain steps could be taken. By the Judicature Act, 1873, s. 26, the division of the legal year into terms is abolished so far as relates to the administration of justice; but the terms may still be referred to for the purpose of determining the time at or within which an act is required to be done.

Subject to the rules of court, the High Court of Justice and the Court of Appeal, and the judges of such courts may now sit and act at any time or place. They now sit as follows:—

The sittings of the Court of Appeal and the sittings in London and Middlesex of the High Court of Justice are four in every year, *viz.*, the Michaelmas sittings, the Hilary sittings, the Easter sittings, and the Trinity sittings. The *Michaelmas* sittings commence on the 2nd of November and terminate on the 21st of December; the *Hilary* sittings commence on the 11th of January and terminate on the Wednesday before Easter; the *Easter* sittings commence on the Tuesday after Easter week and terminate on the Friday before Whitsunday. The *Trinity* sittings commence on the Tuesday after Whitsun week and terminate on the 8th of August (O. 61, r. 1).

Subject to Rules of Court, sittings for the trial by jury of causes and questions or issues of fact are to be held in Middlesex and London, and such sittings are, so far as is reasonably practicable, and subject to vacations, held continuously throughout the year by as many judges as the business to be disposed of may render necessary. Any

judge of the High Court of Justice sitting for the trial of CHAP. IV.  
causes and issues in Middlesex or London, at any place  
heretofore accustomed, or to be hereafter determined by  
Rules of Court, shall be deemed to constitute a court of  
the said High Court of Justice. (J. A. 1873, s. 30.)

## CHAPTER V.

## CIRCUITS.

PART I. ENGLAND and Wales (except London, Middlesex, and Surrey) are divided into certain divisions which are called circuits. Certain of the judges (*a*) acting under commissions from the crown, go these circuits twice a year for the purpose of administering civil and criminal justice. Serjeants-at-law and Queen's Counsel may be included in these commissions and act as judges on circuit. (See J. A. 1873, s. 37.)

Her Majesty by order in council (made by virtue of Judicature Act, 1875, s. 23), dated the 5th February, 1876, ordered that the then existing circuits should be discontinued and others were constituted. The names of these circuits and the counties included therein, will be found in the Appendix (G). The county of Surrey is not included in any circuit though for certain purposes it is deemed to be a circuit (J. A. 1875, s. 23); commissions are to be issued not less than twice in every year for the discharge of civil and criminal business therein (O. 5, Feb. 1876).

There are two circuits in each year, the Spring Circuit and the Summer Circuit (*b*). The former usually begins in February, and the latter at the end of June or beginning of July. Each Circuit lasts about six weeks. The judges who have to go circuit select their circuits by an arrangement among themselves. The commission day for each place is fixed before the commencement of the circuit, and can be easily ascertained.

By the Judicature Act, 1873, s. 29, Her Majesty, by commission of assize or other commission, either general or special, may assign to any judge or judges of the High Court of Justice, or other person usually named in commissions of assize, the duty of trying and determining within any place or district specially fixed for that purpose by

(*a*) As to the judges and other persons to be included in these commissions, see Judicature Act, 1873, s. 37.

(*b*) There are sometimes, in some places, winter assizes. See 39 & 40 Vict. c. 57, by which counties may be united for the purposes of these assizes.



such commission, any causes or matters, or any questions of fact or of law, or partly of fact and partly of law, in any cause or matter depending in the said High Court, or the exercise of any civil or criminal jurisdiction capable of being exercised by the said High Court. Any commissioner so appointed when engaged in the exercise of any jurisdiction assigned to him, is deemed to constitute a court of the High Court of Justice. Subject to the restrictions and conditions imposed by Rules of Court and to the power of transfer, questions of fact, or partly of fact and partly of law, may be tried at the assizes, or London or Middlesex sittings. A cause or matter not involving any question of fact may be tried and determined in like manner with the consent of all the parties thereto.

## CHAPTER VI.

## VACATIONS.

PART I. THE vacations (a) to be observed in the several courts and offices of the Supreme Court are four in every year, viz., the Long vacation, the Christmas vacation, the Easter vacation, and the Whitsun vacation. The *Long vacation* commences on the 10th of August and terminates on the 24th of October (b). The *Christmas vacation* commences on the 24th of December and terminates on the 6th of January. The *Easter vacation* commences on Good Friday and terminates on Easter Tuesday, and the *Whitsun vacation* commences on the Saturday before Whitsunday and terminates on the Tuesday after Whitsunday. The days of the commencement and termination of each sitting and vacation are included in such sitting and vacation respectively. (O. 61, rr. 2, 3.)

The several offices of the Supreme Court are to be open on every day of the year, except Sundays, Good Friday, Monday and Tuesday in Easter week, Whit Monday, Christmas Day, and the next following working day, and all days appointed by proclamation to be observed as days of general fast, humiliation, or thanksgiving. (O. 61, r. 4.)

By r. 9, 26th Feb. 1876, the offices of the Supreme Court (including the judge's chambers) close on Saturdays at 2 o'clock.

By r. 10, 23rd Feb. 1876, the Official Referees are to sit from 10 a.m. to 4 p.m. every day, except Saturday, during the Michaelmas, Hilary, Easter, and Trinity sittings. On Saturdays, during such sittings, they are to sit from 10 a.m. to 2 p.m.; but nothing in this rule is to prevent their sitting on any other days.

By O. 15, 1st Dec. 1875, the offices of each District Registrar of the High Court of Justice are to be open on every day

(a) See Judicature Act, 1873, s. 27; Judicature Act, 1875, s. 17.

(b) No pleading can be amended or delivered during the long vacation unless directed by the court or a judge; and the long vacation is not reckoned in the computation of the times allowed by the rules for filing amending or delivering any pleading unless otherwise directed by the court or a judge (O. 57, rr. 4, 5).

and hour in the year on which the offices of the Registrar of CHAP. VI.  
the County Court of the place in which the District Registry  
is situate are required to be kept open.

By O. 61, rr. 5, 6 (see J. A. 1873, s. 28), two of the judges <sup>Vacation</sup>  
of the High Court are to be selected, in manner pointed <sup>judges.</sup>  
out by this order, at the commencement of each long  
vacation for the hearing in London or Middlesex during  
vacation of all such applications as may require to be imme-  
diately or promptly heard. Such two judges act as vacation  
judges for one year from their appointment. The Lord  
Chancellor is not liable to serve as a vacation judge. The  
vacation judges may sit either separately or together as a  
Divisional Court as occasion requires, and may hear and  
dispose of all actions, matters, and other business to which-  
ever division the same may be assigned. No order made by  
a vacation Judge can be reversed or varied except by a Divi-  
sional Court or the Court of Appeal, or a judge thereof, or  
the judge who made the order. Any other judge of the  
High Court may sit in vacation for any vacation judge.

The vacation judges of the High Court may dispose of all  
actions, matters, and other business of an urgent nature  
during any interval between the sittings of any division of  
the High Court to which such business may be assigned,  
although such interval may not be called or known as a  
vacation. (O. 61, r. 7. See r. 10, 7th Nov. 1876.)

## PART II.

## FUSION OF LAW AND EQUITY, &amp;c.

## CHAPTER VII.

## LAW AND EQUITY TO BE CONCURRENTLY ADMINISTERED.

Law and equity sometimes formerly in conflict.

BEFORE the Judicature Acts there were some matters in which there was a conflict or variance between the rules of equity and the rules of the common-law; and by reason of this a court of law was sometimes bound to give judgment in favour of a plaintiff which a court of equity would restrain him from enforcing. Thus, when one of the parties to a deed under seal had done some act not amounting to an actual prevention of performance, or had entered for valuable consideration into some agreement not under seal, by which another party to the deed would have been absolved from the performance of his covenant but for the circumstance of its being under seal, which by a harsh application of the rule of the civil law (*eo genere quidque dissolvi quo colligatum est*), nullified in a court of law the defence arising out of such an act or agreement, and subjected the covenanting party to a judgment for the damages occasioned by his breach of covenant, thus left technically unexcused, a court of equity would interfere, and, disregarding the mere formality of the seal, would by injunction perpetually prohibit the party, whose act or agreement but for that formality would have constituted a defence, from enforcing the judgment which he has obtained, and which, but for the imperative strictness of the law, the common-law courts would not have pronounced.

Remarks upon equity.

Before calling attention to the enactments in the Judicature Acts as to law and equity being concurrently administered, it may be as well to refer to what Sir William Blackstone says upon the subject of equity and as to courts of equity. The following are extracts from his "Commentaries," vol. iii., p. 50 *et seq.*:—

“The distinction between law and equity, as administered CHAP. VII. in different courts, is not at present known, nor seems to have ever been known, in any other country at any time. And yet the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans; the *jus prætorium*, or discretion of the prætor, being distinct from the *leges*, or standing laws: ‘*Jam illis promissis,*’ inquit Cicero, ‘*non esse standum, quis non videt, quæ coactus quis metu et deceptus dolo promiserit? quæ quidem plerumque jure prætorio liberantur, nonnulla legibus;*’ but the power of both centered in one and the same magistrate, who was equally entrusted to pronounce the rule of law, and to apply it to particular cases by the principles of equity. With us too the *aula regia*, which was the supreme court of judicature, undoubtedly administered equal justice according to the rules of both or either, as the case might chance to require; and when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. For though equity is mentioned by Bracton as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton (composed under the auspices and in the name of Edward the First, and treating particularly of courts and their several jurisdictions), is there a syllable to be found relating to the equitable jurisdiction of the Court of Chancery. It seems, therefore, probable that when the courts of law, proceeding merely upon the ground of the king’s original writs and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person, assisted by his privy council (from whence also arose the jurisdiction of the court of requests, which was virtually abolished by the statute 16 Car. I. c. 10); and they were wont to refer the matter either to the chancellor and a select committee, or by degrees to the chancellor only, who mitigated the severity or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom not only among our Saxon ancestors, before the institution of the *aula regia*, but also after its dissolution, in the reign of king Edward I.; and, perhaps during its continuance, in that of Henry II.”

Again, Sir William Blackstone says, in his “Commentaries,” vol. iii., p. 429 *et seq.* :—

“Equity, in its true and genuine meaning, is the soul and spirit of all law: *positive* law is construed, and *rational* law is made by it. In this, equity is synonymous to justice, in

## PART II.

that, to the true sense and sound interpretation of the rule. But the very terms of a court of *equity*, and a court of *law*; as contrasted to each other, are apt to confound and mislead us; as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illustration to be met with, which now draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either totally erroneous, or erroneous to a certain degree. Thus, in the first place, it is said, that it is the business of a court of equity in England to abate the rigour of the common law. But no such power is contended for. In all cases of positive law, the courts of equity, as well as the courts of law, must say with Ulpian, '*hoc quidem perquam durum est, sed ita lex scripta est.*' It is said that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound, and equally profess, to interpret statutes according to the true intent of the legislature. In general law all cases cannot be foreseen; or, if foreseen, cannot be expressed; some will arise that will fall within the meaning, though not within the words, of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are often said to be within the equity of an act of parliament; and so cases within the letter are frequently out of the equity. Here by *equity* we mean nothing but the sound interpretation of the law; though the words of the law itself may be too general, too special, or otherwise inaccurate or defective. These, then, are the cases which, as Grotius (a) says, '*lex non exacte definit, sed arbitrio boni viri permittit*;' in order to find out the true sense and meaning of the lawgiver, from every other topic of construction. But there is not a single rule of interpreting laws, whether equitable or strictly, that is not equally used by the judges in the courts both of law and equity: the construction must in both be the same: or if they differ, it is only as one court of law may also happen to differ from another. Each endeavours to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter that sense in a single tittle. Once more; it has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge (b), founded on

(a) *De Aequitate*, § 3.(b) Sir Joseph Jekyll, in 2 P. Wms. 753, is reported to have said: "Though proceedings in equity are said to be *secundum discretionem boni*

the circumstance of every particular case. Whereas the CHAP. VII. system of our courts of equity is a laboured connected system, governed by established rules, and bound by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection."

By the Judicature Act, 1873, s. 24, in every civil cause or matter commenced in the High Court of Justice, law and equity shall be administered by the High Court of Justice and the Court of Appeal, respectively, according to the rules following:—

1. If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a Court of Equity, the said courts respectively, and every judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this Act.
2. If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said courts respectively, and every judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have

"*vir*; yet, when it is asked, *vir bonus est quis?* the answer is, *qui consulta patrum, qui leges juraque servat*; and as it is said in *Rooke's* case, 5 Rep. 99, b. that discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is executed here is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion, in some cases, follows the law implicitly; in others, assists it and advances the remedy; in others, again, it relieves against the abuse, or allays the rigour of it: but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court: that is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with."

## PART II.

given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that court for the same or the like purpose before the passing of this Act: *Mostyn v. The West Mostyn Coal and Iron Company Limited*, 45 L. J. C. 401.

3. The said courts respectively, and every judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other (a) matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant (b) shall have properly claimed by his pleading, and as the said courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other (c) person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim, pursuant to any rule of court or any order of court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose, and every person served (d) with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant (*Padwick v. Scott*, 45 L. J. Ch. 350).
4. The said courts respectively, and every judge thereof, shall recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognised and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act (see s. 25, sub-s. 11, *post*, p. 31).

(a) *Wahlberg v. Young*, 45 L. J. Ch. 783.

(b) One defendant cannot obtain relief against a co-defendant; an independent action must be brought for that purpose. *Treleavan v. Bray*, 45 L. J. Ch. 113, *post*, p. 47.

(c) *Swansea Shipping Co. v. Duncan, Fox & Co.*, 45 L. J. Q. B. 423.

(d) *Dear v. Sworder*, 46 L. J. Ch. 500.



5. No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto (a). Provided always, that nothing in this Act contained shall disable either of the said courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said courts, respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the court shall thereupon make such order as shall be just. CHAP. VII.

The Court of Bankruptcy has jurisdiction to restrain proceedings in the Supreme Court. (*Ex parte Ditton, re Woods*, 45 L. J. B. 87, L. R. 1 Ch. 557.)

6. Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and to the other express provisions of this Act, the said courts respectively, and every judge thereof, shall recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the Common Law or by any custom, or created by any statute, in the same manner as the same would have been recognised and given effect to if this Act had not passed, by any of the courts whose jurisdiction is hereby transferred to the said High Court of Justice.
7. The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in

(a) *Garbett v. Fawcus*, 45 L. J. Ch. 133. *Re Rivers Protection and Manure Co. Limited*, 45 L. J. Ch. 132. *Kingschurch v. The People's Garden Co. Limited*, 45 L. J., C. P., 131; L. R. 1 C. P. 45, *Walker v. The Banagher Distillery Co. Limited*, 45 L. J. Q. B. 134.

PART II

them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter ; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided (see *post*, Ch. 15, as to counter-claims).

## CHAPTER VIII.

## AMENDMENTS AND DECLARATIONS OF LAW MADE BY JUDICATURE ACTS.

THE Judicature Act, 1873, s. 25, makes the following amendments in and declarations of the law, viz :—

2. By sub-s. 2 (a) no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations. (See Darby and Bosanquet's Statute of Limitations, 182 ; 3 & 4 W. 4, c. 27, s. 25.) Statutes of limitations inapplicable to express trusts.
3. An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate. Equitable waste.
4. There shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity. Merger.
5. A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass, or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person. Action for possession of land by mortgagor.
6. Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge) Assignment of debts,

(a) Sub-section 1 is repealed by Judicature Act, 1875, and another enactment substituted, see *post*, p. 31.

## PART II.

and choses  
in action  
(a).

only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action, shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees: *Re Haycock's Policy*, 45 L. J. Ch. 247.

Stipulations not of the essence of contracts.

7. Stipulations in contracts, as to time or otherwise, which would not before the commencement (b) of this Act have been deemed to be, or to have become, of the essence of such contracts in, a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity.

Injunctions and Receivers.

8. A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended

(a) At common law choses in action, with some few exceptions, were not strictly assignable. But if a party agreed to assign a chose in action, the assignee might bring an action in the assignor's name to recover possession. Thus, if a debt were assigned, the assignee was entitled to receive the same, and to sue in the assignor's name for the recovery thereof; but the assignee could not sue in his own name.

(b) See Judicature Act, 1875, s. 10.

waste or trespass, such injunction may be granted, if the court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable. (*Pease v. Fletcher*, 45 L. J. Ch. 265. See O. 52, 54, *post*, Chap. 17).

CHAP. VIII.

9. In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail (*a*).
10. In questions relating to the custody and education of infants, the rules of Equity shall prevail. (*Ex parte Goldsmith*, 46 L. J. Q. B. 187.)
11. Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of Equity and the rules of the Common Law with reference to the same matter, the rules of Equity shall prevail.

Damages by collision at sea.

Infants.

Cases of conflict not enumerated.

By Judicature Act, 1875, s. 10, sub-s. 1 of s. 25 Judicature Act, 1873, (*b*), "is hereby repealed, and instead thereof the following enactment shall take effect; (that is to say,) in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the

Adminis-  
tration of  
assets of  
insolvent  
estates.

(*a*) In the Court of Admiralty if the owner of one ship brought an action against the owner of another ship for damages by collision, and both ships were found to have been in fault, the party proceeding recovered only a moiety of his damage; if there was a cross action each party recovered half his own loss: therefore in such a case if two ships, one worth £10,000 and the other worth £5,000, were lost by collision through a common fault, the owner of the latter ship would have to pay to the owner of the former £2,500. The rule applied although the fault on the one side was greater than the fault on the other, for the Court could not apportion the damages according to the quantum of neglect. See Williams and Bruce's Admiralty Practice, p. 72. At common law if ships were injured by the joint fault of both, neither owner could recover from the other, and each had to bear his own loss.

(*b*) See *ante*, p. 29.

PART II. payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act." (*Re Caermarthenshire &c., Co.*, 45 L. J. Ch. 200; *Mathews v. Mathews*, 45 L. J. Ch. 711; *Re The Coal Consumers' Association Limited*, 46 L. J. Ch. 501.)

## PART III.

### PRELIMINARY OBSERVATIONS, &c.

#### CHAPTER IX.

##### PARTIES TO ACTIONS.

BEFORE bringing an action, it is necessary to consider who should be made plaintiff or plaintiffs, and against whom the action should be brought. All proper and necessary persons should be made parties. The effect of misjoinder and nonjoinder will presently be considered. We have not space to go into the whole law of parties to actions, but we ought to refer to the provisions in the Judicature Acts on this subject. The alterations in the law made by these Acts have rendered some of these provisions necessary.

All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. (O. 16, r. 1.) But two owners of distinct properties should not join as plaintiffs in an action to restrain a nuisance; and if several persons are injured by a railway collision, they should not join as plaintiffs in one action for compensation. (*Appleton v. The Chapel Town Paper Co.*, 45 L. J. Ch. 276.)

All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative (a). And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment. (O. 16, r. 3.)

It is not necessary that every defendant be interested as to all the relief prayed for, or as to every cause of action included in the action; but the court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being

(a) See *Evans v. Buck*, 46 L. J. Ch. 157; *Child v. Stenning*, 46 L. J. Ch. 523.

PART III. required to attend any proceedings in such action in which he may have no interest. (O. 16, r. 4.)

The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes. (O. 16, r. 5.)

Where in any action, whether founded upon contract or otherwise, the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, (a) or as may be prescribed by any special order, join two or more defendants, to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action. (O. 16, r. 6.) T. entered into a contract with the plaintiff company to take some of their debentures, asserting that he was acting as L's agent in the matter, and with his authority. L. repudiated the contract on the ground that T. had no such authority. The plaintiff having brought an action against L. for a breach of this contract, subsequently obtained leave under this rule to join T. as defendant for the purpose of claiming alternative relief against him : held that he was properly so joined. (*The Honduras Inter-oceanic Railway Co. Limited, v. Lefevre*, 46 L. J. Ex. 391.)

Trustees  
and execu-  
tors suing,  
&c.

Trustees (b) executors, and administrators, may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the parties beneficially interested in the trust or estate, and shall be considered as representing such parties in the action ; but the court or a judge may, at any stage of the proceedings, order any of such parties to be made parties to the action, either in addition to or in lieu of the previously existing parties thereto. (O. 16, r. 7.)

In general where there are several executors or administrators, all should be joined as plaintiffs in an action, though one be within the age of 17 years, or has not proved or administered. But by 20 & 21 Vict. c. 77, the Act for establishing a Court of Probate, s. 79, "Where any person, after the commencement of this Act, renounces probate of the Will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the

(a) *The Honduras Inter-oceanic Railway Co. Limited v. Lefevre*, 46 L. J. Ex. 391, per Bramwell, L. J.

(b) See 15 & 16 Vict. c. 86, s. 42, *post*, 42, *note*. As to trustees of bankrupts suing, see chap. 34.



testator and the administration of his effects shall and may, CHAP. IX.  
 without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor." And by 21 & 22 Vict. c. 95, s. 16, "whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects, shall, and may without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor."

In general in an action for a debt or damages wherever the cause of action would survive to the wife, she and her husband should be joined as plaintiffs in the action; but sometimes where the cause of action accrues during coverture the husband may sue in his own name or in the joint names of himself and his wife. By Married Woman's Property Act, 1870, s. 11, a married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband has by writing under his hand agreed with her, shall belong to her after marriage as her separate property, and she has in her own name the same remedies against all persons for the protection and security of such wages, &c., and of any property purchased or obtained by means thereof for her own use, as if such wages, &c., belonged to her as an unmarried woman. Also, by the Divorce Acts, (a) a woman who has obtained a decree for a judicial separation, whilst the separation continues, and a wife deserted by her husband who has obtained an order to protect her property &c. against her husband or his creditors, during the continuance thereof, is considered as a *feme sole* for certain purposes, and for suing and being sued in civil proceedings. In cases also where the husband is considered civilly dead, the wife may sue in her own name.

In equity the general rule was the same as at common law, though in particular cases the wife might sue alone. By O. 16, r. 8, married women may sue as plaintiffs by their next friends in the manner practised in the Court of Chancery before the passing of the Judicature Acts. Married

(a) See 20 & 21 Vict. c. 85, ss. 21, 25, 26, 8, 10; 21 & 22 Vict. c. 108, ss. 7, 9; 27 & 28 Vict. c. 44.

## PART III

women may also by leave of the court or a judge sue or defend without their husbands and without a next friend on giving such security (if any) for costs as the court or a judge may require. It is as well, therefore, to state shortly how married women sued without their husbands in the Court of Chancery before the passing of the Judicature Acts.

Where husband and wife sued in such court as co-plaintiffs, or where the husband sued as next friend of the wife, the suit was regarded as the suit of the husband alone. In general, therefore, where the suit related to the separate property of the wife—as a suit to rectify a marriage settlement—it was necessary that it should be brought in her name by her next friend. Where, however, the suit was for a chose in action of the wife, not settled to her separate use, the defendant could not object to the husband suing jointly with the wife as co-plaintiff. Where the wife sued by her next friend (not being her husband), the husband was made a party to the suit, and it was usual to make him a defendant. A wife in her own name by her next friend might sue her husband in respect of her separate property; so might a husband in a similar case sue his wife. A bill, however, could not, as in the case of an infant, be filed by a next friend on behalf of a married woman without her consent. A written authority from and signed by the next friend, to use his name, must have been filed with the bill: (15 & 16 Vict. c. 86, s. 11). He need not have been a relation, but he must have been a person of substance because he was liable to costs. But in some cases where it was shown by affidavit that the wife was unable to procure any substantial person to act as her next friend, an order might be obtained authorising her to institute and prosecute a suit without a next friend *in forma pauperis*. If the next friend of a married woman died or became incapable of acting, or if for any reason the plaintiff desired to remove him, she might at any time, before any defendant had entered an appearance to the bill, introduce into the record the name of a new next friend under an order as of course. After appearance the same might be done where a new next friend was named in the place of a deceased one; but in other cases the order to appoint a new next friend was obtained either on motion or summons after notice. If the plaintiff neglected or refused to obtain the order in the case of the next friend's death, the defendant might apply to the court by motion upon notice for an order directing her to name a new next friend within a limited time, or in default that the bill might be dismissed with

costs. See further, as to this, Daniell's Chancery Practice, CHAP. IX. 5th ed. 84.

Before the 9<sup>th</sup> of August, 1870, when the Married Woman's Property Act, 1870, came into operation, a husband was liable for his wife's debts contracted before marriage, and the general rule was, that wherever the cause of action survived against the wife, they ought to have been sued jointly, but where the husband was civilly dead, she might be sued alone. By this Act, s. 12, a husband is not, by reason of marriage, if it take place after the 9th of August, 1870, liable for the debts of his wife contracted before marriage; but the wife is liable to be sued for and any property belonging to her for her separate use is liable to satisfy such debts as if she had continued unmarried. But by 37 & 38 Vict. c. 50, s. 1, this enactment is repealed so far as respects marriages taking place after the 30th of July, 1874, and a husband and wife married after such date may be jointly sued for any debt of the wife contracted before marriage. By s. 2 of this Act, the husband in such action and in any action brought for damages for any tort committed by the wife before marriage or by reason of the breach of any contract made by the wife before marriage, is liable for the debt or damages respectively to the extent only of the assets hereinafter (a) specified; and in addition to any other plea or pleas, may plead that he is not liable to pay the debt or damages in respect of any such assets; or, confessing his

Actions  
against  
husband  
and wife.

(a) By s. 5, the assets in respect of and to the extent of which the husband shall in any such action be liable are as follows:

1. The value of the personal estate in possession of the wife, which shall have vested in the husband;
2. The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession;
3. The value of the chattels real of the wife which shall have vested in the husband and wife;
4. The value of the rents and profits of the real estate of the wife which the husband shall have received or with reasonable diligence might have received;
5. The value of the husband's estate or interest in any property, real or personal, which the wife in contemplation of her marriage with him shall have transferred to him or to any other person;
6. The value of any property, real or personal, which the wife in contemplation of her marriage with the husband shall with his consent have transferred to any person with the view of defeating or delaying her existing creditors.

Provided that when the husband after marriage pays any debt of his wife, or has a judgment *bond fide* recovered against him in any such action as is in this Act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action be liable.

PART III. liability to some amount, that he is not liable beyond what he so confesses ; and if no such plea is pleaded the husband is deemed to have confessed his liability so far as assets are concerned. By s. 3, if it is not found in such action that the husband is liable in respect of any such assets, he has judgment for his costs of defence, whatever the result of the action may be against the wife. By s. 4, where a husband and wife are sued jointly, if by confession or otherwise it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable is a joint judgment against the husband and wife, and, as to the residue, if any, of such debt or damages, the judgment is a separate judgment against the wife.

As to suing a wife alone after a judicial separation, &c., see 20 & 21 Vict. c. 85, *ante*, p. 35.

By the Judicature Act, 1875, O. 16, r. 8, married women may by leave of the court or a judge defend without their husbands, and without a next friend, on giving such security, if any, for costs as the court or a judge may require.

Before the Judicature Acts the husband in the Court of Chancery might in certain cases have made his wife a defendant. Where, before the above Acts, a bill was filed against husband and wife and she claimed an adverse interest, or was living separate from him, or he was mentally incompetent to answer, or she disapproved of the defence he intended to make, she might, on motion of course, obtain an order to defend separately. In some cases also a plaintiff might have obtained an order for the wife to answer separately. The separate answer of a married woman was put in by her in the same manner as if she were a *feme sole* without guardian, unless she were an infant, when a guardian must have been appointed. The appointment of guardian was made, on motion of course, supported by affidavit of the fitness of the proposed guardian.

Actions by  
infants.

Infants may sue as plaintiffs by their next friends in the manner practised in the Court of Chancery before the passing of the Judicature Acts, and they may in like manner defend any action by their guardians appointed for that purpose. In the Court of Chancery, before the Judicature Acts, an infant sued by his next friend, who need not have been a relative. Before the next friend's name was used, he must have signed a written authority to the solicitor for that purpose ; which was filed with the bill (15 & 16 Vict. c. 86, s. 11). The next friend need not have been a person of substance, and an infant would, on a proper

case being made, be allowed to sue by his next friend *in forma pauperis*. On a proper case being made out, the court would remove the next friend; but he would not be allowed to retire at his own request without giving security for the costs which had been incurred. As to the mode of appointing a new next friend in case of death, &c., see Dan. Chan. Pract. 75. And as to the effect of the plaintiff coming of age pending suit, see *id.* 76.

An infant can defend by guardian only. Where the defendant to a suit in Chancery was an infant, the court appointed a proper person to act on his behalf in the suit. The person so appointed was called the guardian of the infant, and was styled the guardian *ad litem*. The order might be obtained after appearance entered without the defendant appearing personally in court, upon motion of course; the application being supported by an affidavit of the infant's solicitor that the proposed guardian had no interest in the matters in question in the suit adverse to that of the infant, and there must also have been an affidavit of the fitness of the proposed guardian. A co-defendant might be appointed if he had no adverse interest; but neither the plaintiff, nor a married woman, nor a person out of the jurisdiction could be so. No step in the suit, after appearance on the part of the infant, was regular till a guardian *ad litem* had been appointed.

If the guardian died pending the suit, another one must have been appointed, and in the manner above mentioned. For sufficient grounds, the court would remove the guardian on the application of the infant made by his next friend for the purpose of the application.

Where an answer was put in on behalf of an infant, it was put in on the oath of the guardian; but the infant was not bound by such answer, and it could not be read against him. Except in the case of gross misconduct, the guardian would not be ordered to pay the costs of a suit which he had defended unsuccessfully. It seems an infant defendant is liable to the plaintiff for costs although a guardian has been appointed.

By O. 13, r. 1, where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind not so found by inquisition, the plaintiff may apply to the court or a judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and

**PART III.** that notice of such application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian, if any, of such infant, unless the court or judge at the time of hearing such application shall dispense with such last-mentioned service.

Actions by lunatics and persons of unsound mind.

In all cases in which lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the Judicature Acts have sued as plaintiffs or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend in manner practised in the Court of Chancery before the passing of the said Acts, and may in like manner defend any action by their committees or guardians appointed for that purpose. (O. 18.)

Before the Judicature Acts, suits in the Court of Chancery on behalf of a lunatic were usually instituted in his name; but he sued by the committee of his estate, if there was one. A committee, previously to instituting a suit on behalf of an idiot or lunatic, had to obtain the sanction of the Lord Chancellor or Lords Justices, who are entrusted with the care of lunatics. A bill might be filed in the name of a person alleged to be of unsound mind, though not so found by inquisition, by any one proposing to be his next friend; and in such a case the court having proper evidence that he was incapable of protecting his own interests, treated him as insane. Before the name of any person was used as next friend, he had to sign a written authority to the solicitor for that purpose, which was filed with the bill (15 & 16 Vict. c. 86, s. 11).

Actions against lunatics, &c.

Before the Judicature Acts, an idiot or lunatic might be made a defendant to a suit in Chancery, but where he had been found of unsound mind he must have defended by the committee of his estate, who, as well as the idiot or lunatic whose estate was under his care, was a necessary party to a suit respecting that estate. No order was necessary in the suit to entitle the committee to defend, but the sanction of the Lord Chancellor or Lords Justices must have been obtained. If an idiot or lunatic had no committee, or the committee was plaintiff, or had an adverse interest, an order

was obtained, on motion of course, supported by affidavit, appointing a guardian to defend the suit. Lunatics not so found must have defended by guardian, who would be appointed, on motion of course, on application made after appearance entered in the lunatic's name. The application must have been supported by affidavits showing the mental incapacity of the defendant, the fitness of the proposed guardian, and that he had no adverse interest. If the guardian died, a new one might be appointed. No step in the suit could be taken, after appearance, before the guardian was appointed.

The order to appoint the guardian was made under the jurisdiction in Chancery, and not in Lunacy, and if the infirmity was disputed the plaintiff might move, on notice to the defendant, to discharge the order, and an inquiry would be directed if necessary. The defendant, on his recovery, might apply by motion, on notice to the plaintiff and guardian, that the order appointing the latter might be discharged. The answer of an idiot or lunatic was expressed to be made by his committee as his guardian, or by the person appointed his guardian to defend the suit.

The committee or guardian of a lunatic before he consented to any departure from the ordinary course of taking evidence or other procedure in the suit, had first to obtain the sanction of the court or judge; and the committee had also to obtain that of the Lord Chancellor or Lords Justices sitting in Lunacy.

As to the mode of proceeding in default of appearance where the defendant is a person of unsound mind, not so found by inquisition, see O. 13, r. 1, *ante*, p. 40.

Where there are numerous parties having the same interest in one action, one (*a*) or more of such parties may sue or be sued, or may be authorised by the court to defend in such action, on behalf or for the benefit of all parties so interested (O. 16, r. 9). R. 7, 26th June, 1876, makes provision for a case in which the right of an heir-at-law, or the next-of-kin, or a class depends upon the construction which may be put upon an instrument, and it is not known or it is difficult to ascertain who is such heir-at-law, &c. Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of their respective firms, if any (O. 16, r. 10 : *post*, chap. 12).

Where numerous parties.

Subject to the Judicature Acts and the Rules, the provi- In certain

(*a*) *De Hart v. Stephenson*, 45 L. J. Q. B. 575, L. R. 1 Q. B. 313, where one of several owners of a ship sued.

## PART III.

cases former rules of Court of Chancery applicable. Effect of misjoinder and non-joinder.

sions as to parties, contained in section 42 of 15 & 16 Vict., c. 86, are in force as to actions in the High Court of Justice (a). (O. 16, r. 11.)

We will now consider the effect of misjoinder and non-joinder of parties. Misjoinder of plaintiffs does not defeat the action. But judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, is entitled to his costs occasioned by so joining any person or persons who is not found entitled to relief, unless the court in disposing of the costs of the action otherwise direct. (O. 16, r. 1.) Nor does misjoinder of defendants defeat the action. The court or a judge, on such terms as may appear just, may order the name of any plaintiff or

(a) This is an Act for amending the practice in the Court of Chancery. Most of the provisions in section 42 relate to actions in which the Chancery Division of the High Court of Justice has exclusive jurisdiction. But it will be useful to refer to the following parts of this section. "It shall not be competent to any defendant in any suit in the said court to take any objection for want of parties to such suit, in any case to which the rules next hereinafter set forth extend, and such rules shall be deemed and taken as part of the law and practice of the said court, and any law or practice of the said court inconsistent therewith shall be and is hereby abrogated and annulled."

Rule 5. In all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.

Rule 7. In all the above cases the court, if it shall see fit, may require any other person or persons to be made a party or parties to the suit, and may, if it shall see fit, give the conduct of the suit to such person as it may deem proper, and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

Rule 8. In all the above cases the persons who, according to the present practice of the court, would be necessary parties to the suit, shall be served with notice of the decree, and after such notice they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit, and they may, by an order of course, have liberty to attend the proceedings under the decree, and any party so served may, within such time as shall in that behalf be prescribed by the general order of the Lord Chancellor, apply to the court to add to the decree.

Rule 9. In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested under the trust parties to the suit; but the court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties.



defendant improperly joined to be struck out. Before trial CHAP. IX.  
 the application for the order is made upon motion or  
 summons; at the trial it is made in a summary manner.  
 (O. 16, r. 14.)

Nonjoinder of parties may in some cases be fatal unless an amendment be allowed. Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the court or a judge may, if satisfied that it has been so commenced through a *bond fide* mistake, (a) and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as may seem just. The court or a judge may, at any stage of the proceedings, upon or without the application of either party, and on such terms as may appear just, order that the name of any party who ought (b) to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely (c) to adjudicate upon and settle all the questions involved in the action, be added; but no person can be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent thereto. (O. 16, r. 2, 13.) The application for the order is made in the same way as an application to strike out the name of a plaintiff or defendant. In an action for libel which had been brought against the publisher of a newspaper, it appearing after issue closed, in answer to interrogatories, that one A. B. was the sole proprietor of the newspaper, the court, in the exercise of its discretion, made an order under this rule, on the application of the plaintiff, that A. B. should be added as defendant. (*Edward v. Louther*, 45 L. J. C. P. 417.) The plaintiffs having sued on a bill of exchange of which the defendant was acceptor, the defendant stated by way of defence that the bill was accepted by him on behalf of the N. Company in part payment of a ship which was afterwards transferred to the N. Company; that the defendant was induced to accept the said bill by the fraud of the plaintiffs in misrepresenting the seaworthi-

(a) The words *bond fide* mistake in this rule mean a mistake of law as well as of fact: *Duckett v. Gover*, 46 L. J. Ch. 407. In this case leave was granted to make one of the defendants a co-plaintiff.

(b) See *Edward v. Louther*, *infra*; *De Hart v. Stephenson*, 45 L. J. Q. B. 575, L. R. 1 Q. B. 313.

(c) *Harry v. Davey*, 45 L. J. Ch. 697.

PART III. ness of the ship ; and that the defendant and the N. Company had a counter claim over against the plaintiffs for the said fraud and misrepresentation : on the application by the defendants under this rule, to add the N. Company as defendants, the court refused the application. (*Norris v. Beazley*, 46 L. J. C. P. 169.)

Parties whose names are under the above rule so added as defendants must be served with a summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against them are deemed to have begun only on the service of such summons or notice. (O. 16, r. 13.) Where a defendant is added, unless otherwise ordered by the court or a judge, the plaintiff must file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served. (O. 16, r. 15. *Re Wortley*, 46 L. J. Ch. 182.) If a statement of claim has been delivered previously to such defendant being added, the same must, unless otherwise ordered by the court or judge, be amended in such manner as the making such new defendant a party shall render desirable, and a copy of such amended statement of claim must be delivered to such new defendant at the time when he is served with the writ of summons or notice, or afterwards within four days after his appearance. (O. 16, r. 16.)

Proceed-  
ings where  
third  
person  
interested.

We will now consider the mode of proceeding where a third person is interested in the result of an action. By the Judicature Act, 1873, s. 24, sub-s. 3, noticed *ante*, p. 26, the court or a judge has power to grant certain relief against third parties, after notice in writing given to them. By O. 16, r. 17, where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief (a) over against any other person, or where from any other cause it appears to the court or a judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the court or a judge may on notice (b) being given to such last-mentioned person, make such order as may be proper for having the question so determined. (*Shephard*

(a) See *Howell v. General O. Co.*, Court of Appeal, 9 May, 1877.

(b) Delivery of a defence claiming relief against a person already a party to the action is notice within this rule: *Furness v. Booth*, 46 L. J. Ch. 112.

v. *Beane* 45 L. J. Ch. 429, L. R. 2 Ch. 223, where one defendant had a claim against a co-defendant.) CHAP. IX.

By O. 16, r. 18, where a defendant claims to be entitled to contribution, indemnity, or other remedy or relief over against any person not a party to the action, he may, by leave (a) of the court or a judge, issue a notice (b) to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice must be filed with the proper officer and served (c) on such person according to the rules relating to the service of writs of summons. The notice must state the nature and grounds of the claim, and must, unless otherwise ordered by the court or a judge, be served within the time limited for delivering the defendant's statement of defence. With the notice must be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action.

Where a defendant applies for leave to serve a notice under above rule 18, upon a person not a party to the action, it is not necessary for him to show that his claim against such third person is identical or co-extensive with the plaintiff's claim against himself. If the defendant makes out a *prima facie* case that a substantial question in the action brought against him by the plaintiff will also be involved in the determination of his claim against the third person, he will be entitled to the order, unless the effect of introducing such third person would be to embarrass or delay the plaintiff. Where it is *prima facie* shown that one or more such questions will be the same between the two sets of opponents, it will be no objection to the granting of the order that such question or questions will not, as between both sets of opponents, be co-terminous in all their details and consequences, e.g., in the measure of damages, since the court or judge, upon the application for directions under rule 21, has power to limit the mode and extent to which such third person is to be bound or made liable by the decision of such question or questions. Though the third person is bound, as to the correctness of the decision upon the question or questions in respect of which such notice is served, yet he can only be

(a) The power given is discretionary: *Bower v. Hartley*, 46 L. J. Q. B. 126.

(b) See form of notice given by the Act, Appendix B, No. 1. This form may be varied as circumstances may require.

(c) Notice can be served out of the jurisdiction: *Swansea Shipping Co. Limited v. Duncan*, 45 L. J. Q. B. 638; 1 Q. B. (C. A.) 64.

PART III. made liable on such decision, if, when sued in his turn by the defendant, he fails to distinguish the nature or extent of his own liability to the defendant from that of the defendant to the plaintiff in respect of the subject matter of such decision. (*The Swansea Shipping Co. v. Duncan*, 45 L. J. Q. B. 638, L. R. 1 Q. B. (C. A.) 64.) In an action for the non-acceptance of goods the defendants pleaded (among other things), that they bought as brokers for principals, A. & B., as the plaintiffs knew, and that the goods were not according to contract, and were, therefore, refused by the defendants, and A. & B., respectively. The defendants served notices on A. & B. under above rule 18, claiming an indemnity from them, as the goods were ordered on their behalf. It was admitted that the clause as to quality was the same, as between plaintiffs and defendants, on the one hand and defendants and A. & B. on the other:—Held, that the notice had been properly given, and that the court would, under Rule 21, give directions as to the mode of trial; and an order was made in the case, that A. should be at liberty to appear and contest the question of quality, being bound by the result of the trial. The question of costs was reserved till after the trial. (*Benecke v. Frost*, 45 L. J. Q. B. 693.)

Goods were sold and delivered on credit to C. and Co., who became bankrupts before the time for payment arrived, and the goods passed into the possession of the trustee in bankruptcy. Afterward the vendors commenced an action against S. & Co. for the price of the goods, alleging that C. & Co. had been authorised by S. & Co. to order them either on the joint account of C. & Co. and S. & Co., or on account of S. & Co. as undisclosed principals. S. & Co. then, under Order 16, rule 18, served notice upon the trustees of the action, and that they claimed to be indemnified by him as trustee against all liability. Upon the application of the trustee, one of the registrars, sitting as Chief Judge, granted an injunction, restraining S. & Co. from taking further proceedings, under Order 16. But, upon appeal, the order for an injunction was discharged on the ground that the Court of Bankruptcy could not, as between the plaintiffs and S. & Co., try the question of the latter's liability. (*Re Cottie*, 45 L. J. B. 116.)

Mellish, L. J., is reported to have said, "The meaning of the Judicature Act, 1873, section 24, sub-section 3, (*ante* p. 26), was very carefully considered by the judges. We came

to the conclusion that it was not advisable to make any rules which would enable one defendant to obtain relief against his co-defendant without an independent action against him. We considered that we had power to do so, but we thought that it would be intolerable that a plaintiff who might have a good case against the original defendant should be compelled to wait for his remedy while the defendants were fighting *inter se*. The only object of the rules was to bind the third party conclusively by the judgment given as between the plaintiff and the original defendant. But if he wants to get an indemnity or other relief against the third party he must bring an action of his own." (*Treleaven v. Bray*, 45 L. J. Ch. 113, L. R. 1 Ch. (C. A.) 176; *Padwick v. Scott*, 45 L. J. Ch. 350, L. R. 2 Ch. 736).

By O. 16, r. 19, when under rule 17 of this Order it is made to appear to the court or a judge at any time before or at the trial that a question in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff and the defendant and any other person, or between any or either of them, the court or a judge, before or at the time of making the order for having such question determined, shall direct such notice to be given by the plaintiff at such time and to such person and in such manner as may be thought proper, and if made at the trial the judge may postpone same.

By O. 16, r. 20, if a person not a party to the action, who is served as mentioned in rule 18, desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, he must enter an appearance in the action within eight days from the service of the notice. In default of his so doing, he is deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise. A person so served and failing to appear within the eight days may apply to the court or a judge for leave to appear, and such leave may be given upon such terms, if any, as may be thought fit.

By O. 16, r. 21, if a person not a party to the action served under these rules appears pursuant to the notice, the party giving the notice may apply to the court or a judge for directions as to the mode of having the question in the action determined; and the court or judge, upon the hearing of such application, may, if it shall appear desirable so to do, give the person so served liberty to defend the

PART III.

action upon such terms as shall seem just (a), and may direct such pleadings to be delivered, or such amendments in any pleadings to be made, and generally may direct such proceedings to be taken, and give such directions as to the court or a judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the person so served shall be bound or made liable by the decision of the question.

(a) *Benecke v. Frost*, 45 L. J. Q. B. 693, L. R. 1 Q. B. 419 ; *Norris v. Beazley*, 46 L. J. C. P. 515.

## CHAPTER X.

## JOINDER OF CAUSES OF ACTION.

BEFORE commencing an action it is sometimes necessary to consider what causes of action can be joined in it. In this chapter we shall show the provisions made in the Judicature Acts upon this subject.

By O. 17, r. 1, subject to the following Rules, the plaintiff may unite in the same action and in the same statement of claim several causes of action. Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant (O. 17, r. 6) (a). Claims by or against husband and wife may be joined with claims by or against either of them separately (O. 17, r. 4). Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator (O. 17, r. 5). Claims by a trustee in bankruptcy as such cannot, unless by leave of the court or a judge, be joined with any claim by him in any other capacity (O. 17, r. 3). What causes of action cannot be joined with an action for the recovery of land, see O. 17, r. 2, *post* chap. 30.

The court or a judge, if it appear that any causes of action cannot be conveniently tried or disposed of together, may order separate trials of any of them to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof (O. 17, r. 1). An order may be made on the application of the defendant, confining the action to such of the causes of action as may be conveniently disposed of in one proceeding (O. 17, r. 8): *Hall v. The Old Talargoch Lead Mining Company, Limited*, 45, L. J. Ch., 775, and the court or a judge on such application may direct the statement of claim, or, if no statement of claim has been delivered, the copy of the writ of summons, and the indorsement of claim on the writ of summons, to be amended accordingly, and may make such order as to costs as may be just (O. 17, r. 9).

(a) This is subject to the rules 1, 8, & 9 as to ordering separate trials, &c. (O. 17, r. 7.)

(b) As to this including counter-claims, see *Padwick v. Scott*, 45 L. J. Ch. 350.

## CHAPTER XI.

## HOW APPLICATIONS TO THE COURT OR A JUDGE ARE MADE.

PART III. THE Courts and Judges at Chambers, and in some cases the Masters at Chambers, have power in certain cases to make orders respecting matters connected with the action upon the application of a party to the same. As these applications are frequently made in the course of an action, we think it advisable, before proceeding to point out the mode of proceeding in an action to show how these applications are made.

How appli- An application to the court is made when it is sitting, cation to and is called a motion (O. 53, r. 1). A motion is usually courtmade. made by counsel, though a party to an action in respect of a matter in which he is interested may generally make it. There is a rule, however, that a motion for an attachment must be made by counsel. And it may be mentioned that applications to the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court are, subject to the rules, made in the same manner as they would have been made in the Courts of Queen's Bench, Common Pleas, and Exchequer respectively, if the Judicature Acts had not been passed (O. 1, r. 3). Accordingly, in an arbitration where there was no action, an application to enforce payment of the sum awarded was made in the form of a rule to show cause, without notice to the other side, and it was held that this mode of proceeding was right. *Re Phillips and Gill*, 45 L. J. Q. B. 136, L. R. 1 Q. B. 78.

Affidavits. Matters of fact are brought before the court or a judge on a motion or summons by affidavit (O. 37, r. 2) (a); but the court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit (O. 37, r. 2).

Affidavits used in a cause should be entitled in the court and cause, the christian and surnames of the parties being stated, and the addition and place of abode of the

(a) As to filing affidavits to be used in the Court of Appeal, see *post* chap. 27, *Walls v. Walls*, 45 L. J. Ch. 658.



deponent should be stated. They must be drawn up in the first person, and divided into paragraphs, which must be numbered and confined as nearly as may be to a distinct portion of the subject. They must be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which unnecessarily sets forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, are to be paid by the party filing the same (O. 38, r. 3). At the end of an affidavit is the jurat, which is a statement of when, where, and before whom it is sworn. Affidavits may be sworn before a judge of the High Court. They are usually sworn before him at his private room at Westminster, or at Judges' Chambers. There are certain commissioners appointed for taking affidavits, before whom affidavits may be sworn (J. A., 1873, ss. 82, 84). As to swearing affidavits in Scotland and Ireland, see 3 & 4 W. 4, c. 42; and as to swearing same in the Isle of Man and the Channel Islands, see 22 Vict., c. 16, s. 3. In a foreign country affidavits may be sworn before a mayor, magistrate, or other officer there authorised by the law of such country to administer an oath, or before a British consul (6 Geo. 4, c. 87, s. 20), or British ambassador, vice-consul, and others (18 & 19 Vict. c. 42): *Kewan v. Crawford*, 45 L. J. Ch. 658.

By the Common Law Procedure Act, 1854, s. 20, persons may, under certain circumstances, make an affirmation as to the truth of an affidavit, instead of swearing to it (ch. 17).

In some few cases specially provided for the court will, on the application of a party to an action, make an order absolute in the first instance, without any notice being given to the other side. In some cases a motion to the court cannot be made without giving a previous notice of it. By O. 53, r. 3, except where by the practice existing at the time of the passing of the Judicature Act, 1873, any order or rule was made *ex parte* absolute in the first instance, and except where by the rules it is otherwise provided, and except where the motion is for a rule to show cause only, no motion can be made without previous notice to the parties affected thereby. But the court or judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the court or judge may think just; and any party affected by such order may move to set

Order absolute in first instance. When notice of motion necessary.

**PART III.** it aside. Unless the court or judge give special leave to the contrary, there must be at least two clear (a) days between the service of a notice of motion and the day named in the notice for hearing the motion (O. 53, r. 4.) If a party gives notice of motion for a particular day and does not appear, his opponent, if he does appear, will in general be ordered his costs of appearance. (*Daubney v. Shuttleworth*, 45 L. J. Ex. 177, L. R. 1 Ex. 53; *Berry v. The Exchange Trading Co.*, 45 L. J. Q. B. 224, L. R. 1 Q. B. 77.) The plaintiff may, without any special leave, serve any notice of motion or other notice, or any petition or summons upon any defendant, who, having been duly served with a writ of summons to appear in the action, has not appeared within the time limited for that purpose (O. 53, r. 7). The plaintiff may, by leave of the court or a judge, to be obtained *ex parte*, serve a notice of motion upon a defendant along with the writ of summons, or at any time after service of same, and before the time limited for appearance (O. 53, r. 8). If on the hearing of a motion or other application the court or judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the court or judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the court or judge may think fit to impose (O. 53, r. 5).

Applica-  
tion after  
such notice.

When notice of motion has been given on the day mentioned in it, or on some convenient day afterwards, the motion is made in court, and, after hearing the parties or their counsel, the court may grant the motion, either in the whole or in part, or refuse it. The hearing of a motion may be adjourned upon such terms, if any, as the court or judge think fit (O. 53, r. 6). Either party, by leave of the court, may make affidavits in answer to the affidavits of the opposite party upon any new matter arising out of them. The court has also the power, on the hearing of any motion, to order the production of documents, or the attendance of witnesses to be examined *viva voce* (C. L. P. Act, 1854, ss. 46, 47). When the affidavits are conflicting, the court will sometimes refer the matter to the master to report what the facts really are, and then the court will in general act upon such report. In some cases upon the hearing of a rule where the facts are in dispute, the court will direct certain questions to be tried by a jury, and afterwards act upon their verdict.

Rule *nisi*.

In some cases a rule *nisi* only is granted in the first

(a) *Daubney v. Shuttleworth*, 45 L. J. Ex. 177.

instance. A rule *nisi* is a rule calling on a party to show cause why a certain order should not be made by the court. By O. 53, r. 2, no rule or order to show cause is granted in any action, except in the cases in which an application for such rule or order is expressly authorised by the rules. When the rule is *nisi* only, it must be drawn up at the proper office, and served on the party called on to show cause, or on his solicitor, if he has appeared by one. The affidavits used in support of the rule *nisi* must be filed, and the party who shows cause must take office copies of the same before he can do so; and he can, of course, use other affidavits on doing so. On the day mentioned for that purpose in the rule *nisi*, or on some subsequent convenient day the matters in question on the rule will be heard, much in the same way as mentioned *supra* when a notice of the motion has been given, and the court will then either discharge the rule, or make it absolute in whole or in part, or refer it to the master, as above-mentioned. The costs of the rule are in the discretion of the court.

A rule absolute, when granted by the court in any of the above ways, should be served on the party ordered to do any act by the rule, or otherwise affected by it. It is served in the same way as other documents in the cause. The rule, whether in an action, cause, or matter, may be enforced in the same manner as a judgment, with the same effect (O. 42, r. 20; *post*, chap. 26). In some cases it will be enforced by attachment.

There are many applications, particularly those relating to points of practice, which are heard and disposed of by a judge or master (a) in chambers.

By the Judicature Act, 1873, s. 39, a Judge of the High Court of Justice may, subject to the rules of court, exercise in chambers any part of the jurisdiction vested in the High Court, as before the passing of this Act might have been heard in chambers by a single judge, or as may be directed or authorised to be so heard by any rules of court. (*Baker v. Oakes*, 46 L. J. Q. B. 246.)

By O. 54, r. 2, in the Queen's Bench, Common Pleas, and Exchequer Divisions a master, and in the Probate, Divorce, and Admiralty Division a registrar, may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Judicature Act or the Rules may be transacted or exercised by a judge at chambers, except in respect of the following proceedings and matters, that is to say:—

(a) See 30 & 31 Vict. c. 63.

## PART III.

All matters relating to criminal proceedings, or to the liberty of the subject :

The removal of actions from one division or judge to another division or judge :

The settlement of issues, except by consent :

Discovery, whether of documents or otherwise, and inspection, except by consent :

Appeals from district registrars :

Interpleader other than such matters arising in interpleader as relate to practice only, except by consent :

Prohibitions :

Injunctions and other orders under sub-section 8 of section 25 of the Act (*ante*, p. 30), or under Order 52., Rules 1, 2, and 3 respectively (*post*, chap. 17) :

Awarding of costs, other than the costs of any proceeding before such master :

Reviewing taxation of costs :

Charging orders on stock funds, annuities, or share of dividends or annual produce thereof :

Acknowledgments of married women.

By O. 19, 26 June, 1876, the authority and jurisdiction of a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions does not extend to granting leave for service out of the jurisdiction of a writ of summons, or of notice of same.

The master may refer any matter which appears to him proper for the decision of a judge to him, who may either dispose of the matter or refer the same back to the master with such directions as the judge may think fit (O. 54, r. 3).

Any person affected by any order or decision of a master may appeal therefrom to a judge at chambers. Such appeal must be by summons, within four days after the decision complained of, or such further time as may be allowed by a judge or master (O. 54, r. 4). (Bitt, 60, 67, 120, 121). An appeal from a master's decision is no stay of proceedings unless so ordered by a judge or master (O. 54, r. 5).

How application at chambers is made.

An application at chambers in general is made in a summary way by summons, and by O. 57, r. 1, every application at chambers authorised by the rules is to be made in a summary way by summons. This summons is obtained at the judge's chambers, and calls on the opposite party to show cause why the order desired should not be made. A copy of the summons is served on such party or his solicitor if he has appeared by solicitor. Upon the parties or their solicitors or counsel appearing before the judge or master

an order is either made or refused. The powers as to directing the oral examination of witnesses and the production of documents and adjournment extend to application to a judge at chambers. The order, if made, should be drawn up and served on the party ordered to do any act or affected by it forthwith. The costs of counsel attending at judges' chambers are not allowed, unless the judge certifies that the case was a proper one for counsel to attend (O. 12 August, 1875). CHAP. XI.

Upon the hearing of the summons the judge, instead of making or refusing an order, may in general refer the parties and the questions arising on the summons to a Divisional Court: in which case the application must be made to such court (J. A. 1873, s. 46).

By the Judicature Act, 1873, s. 49, no order made by the High Court of Justice or any judge thereof, by the consent of parties (a), or as to costs only, which by law are left to the discretion of the court, is subject to any appeal, except by leave of the court or judge making such order. Appeal.

By the Judicature Act, 1873, s. 50, every order made by a judge in chambers, except orders made in the exercise of such discretion as aforesaid, may be set aside or discharged upon notice by any Divisional Court, or by the judge, sitting in court, according to the course and practice of the court. No appeal lies from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the judge by whom such order was made, or of the Court of Appeal. This enactment does not confer a right of appeal against a judge's order where the appeal was specially taken away before the Act. (*Dodds v. Shepherd*, 45 L. J. Ex. 457.)

In the Queen's Bench, Common Pleas, and Exchequer Division every appeal to the court from any decision at chambers must be by motion, and must be made within eight days (b) after the decision appealed against (O. 57, r. 6). When the last of the eight days falls on a Sunday, the motion may be made on the Monday. (*Taylor v. Jones*, 45 L. J. C. P. 110; L. R. 1 C. P. 87, O. 57, r. 3.) But the time for appealing may be abridged or enlarged under O. 57, r. 6. (*Crom v. Samuel*, 46 L. J. C. 1, L. R. 2 Q. B. 51.) It is necessary to get this time enlarged if the court is not sitting during the eight days.

(a) See *Dodds v. Shepherd*, 45 L. J. Ex. 457.

(b) See *Crom v. Samuel*, *infra*.

## PART IV.

PROCEEDINGS FROM COMMENCEMENT OF ACTION  
TO NOTICE OF TRIAL.

## CHAPTER XII.

## WRIT OF SUMMONS.

- a. *When defendant is within the jurisdiction*, p. 57.
- b. *When defendant is out of the jurisdiction*, p. 65.

Notice  
of Action.

In general a notice of action is not necessary. But by statutes, actions cannot be brought against some public officers for acts done by them in the execution of their duty, unless notice of action be given (see 11 & 12 Vict. c. 44, s. 9). So some persons acting under statutes are sometimes entitled to notice of action in respect of any matter done under them. The 5 & 6 Vict. c. 97, s. 4, enacts that in all cases where notice of action is required it must be given one calendar month at least before the action is commenced.

By the Judicature Act, 1875, all actions which have hitherto been commenced by writ (*a*) in the superior courts

(a) At the time the Judicature Acts came into operation all personal actions in the superior courts of common law were commenced by writ of summons (C. L. P. Act 1852, s. 2), and by s. 168 of this Act an action of ejectment to recover the possession of land was commenced by writ.

The actions most commonly brought in the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice, are actions for debts, for breaches of contract, for torts, where damages are claimed, and for the recovery of the possession of personal property and land. Since the Judicature Acts, the provisions in the Common Law Procedure Act, 1854, ss. 68—74 and 79, as to actions for mandamus and actions where a writ of injunction is claimed are not of much practical importance. By 3 & 4 W. 4, c. 27, s. 36, all real and mixed actions were abolished, except actions of writ of right of dower, dower, *quare impedit*, and ejectment. By the Common Law Procedure Act, 1860, s. 26, no writ of right of dower or writ of dower *unde nihil habet*, and no plaint for free bench or dower in the nature of any such writ, and no *quare impedit*, shall be brought after the commencement of this Act in any court whatsoever, but where any such writ, action, or plaint would now lie, either in a superior or any other court, an action may be commenced by writ of summons issuing out of the Court of Common Pleas, in the same manner and form as the writ of summons in an ordinary action; and upon such writ

of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, are to be instituted in the High Court of Justice by a proceeding to be called an action (O. 1, r. 1). CHAP. XII.

*a. When defendant is within the Jurisdiction.*

By O. 2, r. 1, every action in the High Court is commenced by a writ of summons, which writ is directed to the defendant, and runs in the Queen's name. In general it commands him that within eight days after the service of the writ on him, inclusive of the day of such service, he cause an appearance to be entered for him in a Division of the High Court of Justice (naming it (a) in an action at the suit of the plaintiff, and the writ gives the defendant notice that, in default of his so doing, the plaintiff may proceed and judgment may be given in the defendant's absence. We have already noticed, *ante* p. 33, that care must be taken that the proper and necessary parties be made plaintiffs and defend-

Action to be commenced by writ of Summons. Form of same.

shall be indorsed a notice that the plaintiff intends to declare in dower, or for free bench, or in *quare impedit*, as the case may be (and see s. 27).

As to the former mode of proceeding in an action of ejectment, and as to the present action for recovering the possession of land, see chap. 30.

An action of *scire facias*, was, before the Judicature Acts, commenced by writ. This action still in some cases lies. It lies against members of a joint-stock company or other body upon a judgment recovered against a public officer or other person sued as representing such company or body, or against such company or body itself. It also lies upon a suggestion of further breaches after judgment for a penal sum under 8 & 9 W. 3, c. 11, s. 8, and in other cases (see C. L. P. Act, 1852, s. 132). A *scire facias* also lies to repeal letters patent, &c. Before the Common Law Procedure Act, 1852, a judgment was revived by a writ of *scire facias* when it was necessary to revive it by reason of lapse of time or by reason of death or otherwise; but, by the 129th section of this Act, a judgment in such cases was revived by suggestion, or by writ of revivor; and by the Judicature Acts, this latter mode of proceeding is done away with and another and simpler mode of proceeding adopted, as mentioned in chap. 26.

In the above cases, where it is stated that an action of *scire facias* still lies, the action is now commenced by writ of summons.

As to the mode of commencing an action of *replevin* and the proceedings in such action, see chap. 31.

(a) By O. 5, r. 4, subject to the power of transfer, the plaintiff, if the cause or matter would have been within the non-exclusive cognisance of the High Court of Admiralty if the Judicature Acts had not been passed, must assign the action to one of the Divisions of the High Court, by marking the writ with the name of the Division and giving notice thereof to the proper officer of that court. If so marked for the Chancery Division the same must be assigned to one of the judges of such Division by marking the same with his name. Actions within the exclusive jurisdiction of any division of the High Court must of course be assigned to such division (see *ante*, p. 8, *et seq.*)

## PART IV.

ants. Persons claiming or being liable as co-partners may sue or be sued in the name of their respective firms, if any ; and any party to an action may in such case apply by summons to a judge for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the judge may direct (O. 16, r. 10). And by R. 8, 26 June, 1876, any person carrying on business in the name of a firm apparently consisting of more than one person, may be sued in the name of such firm. The writ, except in the cases in which any different form is provided, is to be in the form in the Appendix (A), No. 1, Part I. with such variations as circumstances may require (O. 2, r. 3). The writ must specify the division of the High Court to which the action is to be assigned (O. 2, r. 1). As to the right of the plaintiff to assign the cause to any division he may think fit, see *ante*, p. 10. It bears date on the day on which the same is issued, and is tested in the name of the Lord Chancellor, or, if the office of the Lord Chancellor be vacant, in the name of the Lord Chief Justice of England (O. 2, r. 8). A particular form of writ is given where the defendant is residing out of the jurisdiction (see *post*, p. 66). With respect to actions upon a bill of exchange or promissory note, commenced within six months after the same has become due and payable, the procedure under the Bills of Exchange Act, 18 & 19 Vict. c. 67 (a), still con-

(a) By this Act, actions on bills of exchange or promissory notes commenced within six months after same have become due, may be commenced by a writ of summons, in a form given by the Act. The plaintiff, on filing an affidavit of the personal service of such writ within the jurisdiction of the court, or an order for leave to proceed as if personal service had been effected, and a copy of the writ of summons and the indorsements thereon, may sign judgment and issue execution. A defendant may, however, upon paying into court the sum indorsed on the writ, or by showing upon affidavit a defence to the action upon the merits, or such facts as would make it incumbent on the holder of the bill or note to prove consideration, or such other facts as the judge may deem sufficient, within twelve days from the service of the writ, get leave from a judge to appear and to defend the action. No other claim than a claim on the bill or note can be included in a writ issued under this Act. But, where the defendant obtains leave to appear and does so the plaintiff may include in his statement of claim, with a count on the bill or note, a count upon the consideration, if any, between the plaintiff and defendant for the same, and deliver a particular of demand accordingly. (R. H. T. 1858.) A writ issued under the Bills of Exchange Act is subject to the rules of the Judicature Acts, though first subject to the conditions of the Bills of Exchange Act. (*Oger v. Bradnum*, 45 L. J. C. P. 273. See *Norris v. Beazley*, 46 L. J. C. P. 169). Where partners are sued under this latter Act the plaintiff cannot enter final judgment if there has only been a service of the writ upon a person having the control or



tinues to be used (O. 2, r. 6). If the writ is issued CHAP. XII. out of the registry of any district, certain variations in the form of the writ are required as mentioned in chap. 35.

Any costs occasioned by the use of any more prolix or other forms of writs, and of indorsements thereon, than the forms prescribed, are to be borne by the party using the same, unless the court shall otherwise direct (O. 2, r. 2).

Before the writ is issued it must be indorsed with a Indorse-  
ments on  
writ. general statement, which need not be very precise, of the nature of the claim made, or of the relief or remedy required in the action. (O. 2, r. 1; O. 3, r. 1: *Colebourne v. Colebourne*, 45 L. J. Ch. 749; L. R. 1 Ch. 690.) This indorsement may be amended by leave of the court, or a judge, so as to extend it to any other cause of action, or any additional remedy or relief. Forms of indorsements of claim are given by the Judicature Act of 1875, which will be found in the Appendix (A.): and the same or similar concise forms may be adopted (O. 3). (a)

By O. 3, r. 6, in all actions (b) where the plaintiff seeks merely to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt, or on a guaranty, whether under seal or not, where the claim against the principal is in respect of such debt, or liquidated demand, bill, cheque, or note, or on a trust, the writ of summons *may* be specially indorsed with the particulars of the amount sought to be recovered, after giving credit for any payment or set-off.

It is not necessary to set out all the items of an account in detail to make the indorsement a special one (Bitt. 33). When a writ can be specially indorsed under this rule, it is in general advisable so to indorse it. The main object of making this indorsement is that the plaintiff may sign final judgment on default of appearance as mentioned, *post*, ch. 16. (O. 13, r. 3) or in the event of appearance, apply to a judge for leave to sign judgment as mentioned, *post*, p. 71; and see

management of the partnership business under O. 9, r. 6, *post*, p. 63. (*Pollock v. Campbell*, 45 L. J. Ex. 199).

(a) In an action of mandamus or where a writ of injunction is claimed under the Common Law Procedure Act, 1854, ss. 68—74, there should be a notice on the back of the writ that the plaintiff intends to claim a mandamus or injunction as the case may be.

(b) Bitt. 82.

PART IV. *post*, ch. 15, as to when a statement of claim is unnecessary when there is this special indorsement.

By O. 3, r. 7, wherever the plaintiff's claim is for a debt or liquidated demand only, the indorsement, beside stating the nature of the claim, *shall* state the amount claimed for debt, or in respect of such demand, and for costs respectively, and shall further state, that upon payment thereof within four days after service, or in case of a writ not for service within the jurisdiction within the time allowed for appearance, further proceedings will be stayed. Such statement may be in the form in Appendix (A) hereto, Part II., sec. III. (a). The defendant may, notwithstanding such payment, have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's solicitor shall pay the costs of taxation.

By O. 3, r. 8, in all cases of ordinary account, as, for instance, in the case of a partnership or executorship or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons must be indorsed with a claim that such account be taken (b).

By O. 4, r. 1, the solicitor of a plaintiff suing by a solicitor must indorse upon every writ of summons and notice in lieu of service of a writ of summons the address of the plaintiff (c), and also his own name or firm and place of business, and also, if his place of business shall be more than three miles from Temple Bar, another proper place, to be called his address for service, which must not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him. And where any such solicitor is only agent of another solicitor,

(a) See the form in the Appendix.

(b) In default of appearance to a summons indorsed under this rule, and after appearance, unless the defendant, by affidavit or otherwise, satisfy the court or a judge that there is some preliminary question to be tried, an order for the account claimed, with all directions now usual in the Court of Chancery in similar cases, shall be forthwith made. An application for such order must be made by summons, and be supported by an affidavit filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account. The application may be made at any time after the time for entering an appearance has expired (O. 15, rr. 1 & 2).

When there has been a default of appearance the plaintiff must file an affidavit of service, or of notice in lieu thereof, as the case may be (see O. 13 r. 2, *post*, p. 92.)

As to the making of an order in a district registry, see *Irlam v. Irlam*, L. R. 2 Ch. 608.

(c) Bitt. p. 71

he must add to his own name or firm and place of business CHAP. XII. to the name or firm and place of business of the principal solicitor.

By O. 4, r. 2, a plaintiff suing in person must indorse upon every writ of summons and notice in lieu of service of a writ of summons his place of residence and occupation, and also, if his place of residence is more than three miles from Temple Bar, another proper place, to be called his address for service, which must not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings and written communications may be left for him.

By O. 2, 23 Feb. 1876, the above two rules are to apply only to cases in which the writ of summons is issued out of the London office (see r. 3, 23 Feb. 1876, noticed chap. 35, which applies when the writ is issued out of a district registry).

By O. 3, r. 4, if the plaintiff sues or the defendant or any of the defendants is or are sued in a representative capacity, the indorsement must show, in manner appearing by the forms given by the Act (a), or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued.

The writ is prepared by the plaintiff or his solicitor, and must be written or printed, or partly written and partly printed, on paper of the same description (b) as by the Act of 1875 directed in the case of proceedings directed to be printed (O. 5, r. 5). The plaintiff, wherever resident, may issue the writ in London or out of the registry of any district. Preparation and issuing of writ.

The writ is issued by getting it sealed by the proper officer (O. 5, r. 6). At the time it is sealed there must be left with the officer a copy on paper of the description aforesaid, of the writ and indorsements thereon, which copy must be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person. This copy has to be filed by the officer, and he has to make certain entries in a book called the cause-book. The leaving of this copy with the officer is a sufficient notification of the division of the court to which the action is assigned by the plaintiff (O. 5, rr. 7, 8, 9; O. 3, 26 June, 1876).

Order 6 makes provisions respecting concurrent writs. The plaintiff may, at the time of or at any time during Concurrent writs.

(a) See Appendix A, Part 2, s. 8.

(b) See Ch. 39.

PART IV. twelve months after the issuing of the original writ of summons, issue one or more concurrent writ or writs, which must bear teste of the same day as the original writ, and be marked with a seal bearing the word "concurrent," and the date of issuing the concurrent writ; and such seal must be impressed upon the writ by the proper officer. Concurrent writs are only in force for the period during which the original writ is in force (O. 6, r. 1). A writ for service within the jurisdiction may be a concurrent writ with one for service, &c., out of the jurisdiction; and a writ for service &c., out of the jurisdiction may be a concurrent writ with one for service within the jurisdiction (O. 6, r. 2).

Renewal  
of writs.

Order 8 states how long the writ is to be in force, and makes provisions for the renewal thereof. No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein-named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months (a) apply to a judge, or the district registrar, for leave to renew the writ; and the judge or registrar, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal, and so from time to time during the currency of the renewed writ. The writ is renewed by being marked with a seal kept for that purpose by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in a certain form (Appendix A, No. 5, part 1). A writ so renewed remains in force and is available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons (O. 8, r. 1). When the original writ is lost there is no power of obtaining a renewal of it. (*Davies v. Garland*, 45; L. J. Q. B. 137; L. R. 1 Q. B. 250.) Leave may be given after the expiration of the twelve months to renew a writ. (*Eyre v. Cox*, 46; L. J. Ch. 316, see *post*.)

The production of the writ, purporting to be marked with the seal of the court, showing the same to have been renewed in manner aforesaid, is sufficient evidence of its having been so renewed, and of the commencement of the action, as of

(a) When the writ is amended the twelve months must be reckoned from the day when it was issued, and not from the date of amendment. (*Eyre v. Cox*, 46 L. J. Ch. 316.)

the first date of such renewed writ for all purposes CHAP. XII.  
(O. 8, r. 2).

By r. 6, 23 Feb. 1876, the court or a judge, may, at any stage of the proceedings, allow the plaintiff to amend the writ of summons in such manner, and on such terms, as may seem just. Amend-  
ment of  
writ.

While the writ is in force a true copy of it should be served, if practicable, on the defendant personally, and the writ itself should be shown to him at the time of service if he requires to see it ; but no service of the writ is required where the defendant by his solicitor agrees to accept service and enters an appearance (O. 9, r. 1). The service may be effected by any one who can read and write. It is necessary that he should be able to read in order that he may be able to swear, if necessary, that the copy served was a true one ; and it is necessary that he should be able to write in order that he may make the indorsement required to be made on the writ as to the time of service. The service may be in any county. Service of  
writ.

By O. 9, r. 3, when both husband and wife are defendants service on the husband is deemed good service on the wife ; but the court or a judge may order that the wife shall be served with or without service on the husband (*ante*, p. 38).

When an infant is a defendant, service on the father or guardian, or if none, then upon the person with whom the infant resides, or under whose care he or she is, is, unless the court or judge otherwise orders, deemed good service on the infant ; but the court or judge may order that service made or to be made on the infant shall be deemed good service (O. 9, r. 4). As to an infant defending by guardian, see O. 16, r. 8, *ante*, p. 38.

When a lunatic or person of unsound mind not so found by inquisition is a defendant, service on the committee of the lunatic, or on the person with whom the person of unsound mind resides or under whose care he or she is, is, unless the court or judge otherwise orders, deemed good service on such defendant (O. 9, r. 5). As to lunatics defending actions by committees or guardians, see O. 18, *ante*, p. 40.

A new provision has been made as to the service of partners. By O. 9, r. 6, where partners are sued in the name of their firm (O. 16, r. 10), the writ must be served either upon one or more of them, or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there ; and, subject to the

PART IV, rules hereinafter contained, such service is deemed good service upon the firm.

By r. 4, 26 June, 1876, where one person, carrying on business in the name of a firm apparently consisting of more than one person, is sued in the firm name, the writ may be served at the principal place, within the jurisdiction, of the business so carried on, upon any person having at the time of service the control or management of the business there; and subject to the rules such service is deemed good service on the person so sued. To enable service of a writ to be made under this rule upon the defendant's manager, it is not necessary that the defendant himself should be within the jurisdiction. It is enough if he carry on the business in the name of a firm, and has a place of business within the jurisdiction under the control or management of some person. (*O'Neil v. Clason*, 46 L. J. Q. B., &c., 191.)

Whenever, by any statute, provision is made for service of any writ of summons, bill, petition, or other process upon any corporation, or upon any hundred, or the inhabitants of any place, or any society or fellowship, or any body or number of persons, whether corporate or otherwise, every writ of summons may be served in the manner so provided (O. 9, r. 7). By the Common Law Procedure Act, 1852, s. 16, the service, where the defendant is a corporation aggregate, may be on the mayor or other head officer, or on the town-clerk, clerk, treasurer, or secretary of such corporation; where the inhabitants of a hundred or other like district are defendants, the service may be on the high constable or any of the high constables thereof; where the inhabitants of any county, of a city, or town, or of any franchise, liberty, city, town, or place, not being part of a hundred, or other like district, are defendants, the service may be on some peace officer thereof.

"The person serving a writ of summons, shall within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default; and every affidavit of service of such writ shall mention the day on which such indorsement was made" (O. 9, r. 13). This rule does not apply when there has been a substituted service. (*Dymond v. Croft*, 45 L. J. Ch. 604; L. R. 3 Ch. 512 (C. A.))

Where  
service  
cannot be  
effected.

The court or a judge, if it be made to appear by affidavit that the plaintiff is from any cause unable to effect prompt personal service, may make such order for substituted or other service, or for the substitution of notice for service,

as may seem just (O. 9, r. 2, *Sloman v. The Governor of New Zealand*, L. R. 1 C. P. (C. A.) 563 ; 46 L. J. C. P. 185, Bitt. 15. The affidavit should set forth the grounds upon which the application is made (O. 10), and should shew a probability of the substituted service coming to the defendant's knowledge (see *Cook v. Dey*, 45 L. J. Ch. 611 ; L. R. 2 Ch. 218). The nature of the substituted service must depend upon circumstances. Service upon the defendant's solicitor and sending a copy of the writ by post to the last known address of the defendant has been ordered as substituted service. This rule as to substituted service does not apply to a writ under the Bills of Exchange Act, as that Act requires personal service. (*Pollock v. Campbell*, L. R. 1 Ex. 50 ; 45 L. J. Ex. 199.)

By O. 7, r. 1, a solicitor whose name is indorsed on the writ must on demand in writing made by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith whether such writ has been issued by him or with his authority or privity. If such solicitor declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the court or a judge.

By O. 7, r. 2, when a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors must on demand in writing by or on behalf of any defendant, declare forthwith the names and places of residence of all the persons constituting the firm. If such demand be not complied with, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the court or a judge may direct. When the names of the partners are so declared, the action proceeds in the same manner and the same consequences in all respects follow as if they had been named as the plaintiffs in the writ. But all proceedings, nevertheless, continue in the name of the firm.

As to a solicitor being bound to disclose the abode and occupation, &c., of his client, see Common Law Procedure Act, 1852, s. 7.

(b) *When defendant is out of the Jurisdiction.*

Before the Judicature Acts there was a difference in the proceedings in this case where the defendant was a British subject and where he was a foreigner.

By the Common Law Procedure Act, 1852, s. 18, a writ of summons in a particular form might issue out of the

**PART IV.** superior courts of law against a British subject residing out of the jurisdiction of the same in any place except in Scotland or Ireland. The time for appearance to this writ was regulated by the distance from England of the place where the defendant was residing. The court or a judge might, upon being satisfied by affidavit that there was a cause of action which arose within the jurisdiction (a), or in respect of the breach of contract made within the jurisdiction, and that the writ had been personally served upon the defendant, or, that reasonable efforts had been made to effect personal service, and that it had come to his knowledge, and either that he wilfully neglected to appear to the writ or that he was living out of the jurisdiction to defeat or delay his creditors (b), give directions as to the manner of proceeding in the action. The plaintiff must, before obtaining judgment, have proved the amount of the debt or damages claimed by him in the action either before a jury upon a writ of inquiry or before one of the masters, as the court or judge might direct.

A person residing out of the jurisdiction of the court and not being a British subject might be sued in the same way as a British subject out of the jurisdiction might be, except that a different form of writ was used, and a notice of the writ was served on the defendant instead of a copy thereof. The like proceedings after service of the writ as those above-mentioned with regard to a British subject might be taken (C. L. P. Act, 1852, s. 19).

By the Judicature Acts leave to issue the writ where the defendant is out of the jurisdiction must be obtained from the court or a judge; this was not formerly necessary (O. 2, r. 4; *Young v. Brassey*, 45 L. J. Ch. 142). A particular form of writ is given in this case (Appendix A., forms 2 & 3, Part I.); but variations may be made in it as circumstances may require (O. 2, r. 5). Some of the previous remarks as to writs of summons where the defendant is within the jurisdiction apply to writs against defendants out of the same. As to concurrent writs, see *ante*, p. 62.

By O. 11, r. 1, service out of the jurisdiction of the writ or notice of same may be allowed by the court or a judge (c) whenever the whole or any part of the subject-matter of the action is land or stock, or other property

(a) See *Re The City of Mecca*, 45 L. J. Prob. 92. A case of collision on the high seas.

(b) See *Branton v. Griffiths*, 45 L. J. C. P. 588.

(c) A master or district registrar cannot grant leave to serve a writ or notice thereof out of the jurisdiction. (O. 19, 26 June, 1876.)



situate within the jurisdiction, (a) or any act, deed, will, or thing affecting such land, stock, or property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract, wherever made; and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the jurisdiction. Scotland and Ireland are out of the jurisdiction (*Green v. Browning*, W. N. 1876, p. 190). It seems that since the Judicature Acts a writ of summons for service out of the jurisdiction may be issued against a foreign corporation; but service of notice of the writ only should be made. (*Westman v. Aktiebolaget &c.*, &c., 45 L. J. Ex. 327; L. R. 1 Ex. 237; *Scott v. The Royal Wax Candle Co.*, 45 L. J. Q. B. 586; L. R. 1 Q. B. 404.) Service of a writ out of the jurisdiction will not be allowed in an action for slander of title to a ship within the jurisdiction. (*Casey v. Arnott*, 46 L. J. C. P. 3; L. R. 2 C. P. 24.) An application to serve a writ out of the jurisdiction must be made on an affidavit showing that the case is within the above rule. (*The Great Australian Gold Mining Co. v. Martin*, 46 L. J. Ch. 289).

Every application for an order for leave to serve the writ or notice on a defendant out of the jurisdiction must be supported by evidence, by affidavit, or otherwise, showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made (O. 11, r. 3).

By r. 5, 26 June, 1876, whenever any action is brought in respect of any contract which is sought to be enforced, or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, when such contract was made or entered into within the jurisdiction, or whenever there has been a breach within the jurisdiction of any contract, wherever made, the judge, in exercising his discretion as to granting leave to serve such writ, or notice on a defendant out of the jurisdiction, shall have regard to the

(a) This rule does not apply where an injury has been done by a foreign ship on the high seas. (*Re Smith*, L. R. 1 P. D. 300, *Harris v. The Owners of the Franconia*, 46 L. J. C. P. 363.)

PART IV. amount or value of the property in dispute, or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local court of limited jurisdiction, having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in England, or in the place of such defendant's residence, and in all the above-mentioned cases no such leave is to be granted without an affidavit stating the particulars necessary for enabling the judge to exercise his discretion in manner aforesaid, and all such other particulars (if any) as he may require to be shewn.

Any order giving leave to effect such service or give such notice must limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given (O. 11, r. 4). Notice in lieu of service must be given in the manner in which writs of summons are served (O. 11, r. 5). These last two rules applying to notices to third parties under O. 16, r. 17, noticed *ante*, p. 44.

The question of service of a writ out of the jurisdiction is finally determined when leave to serve it is given under Order 11, subject to any application by the defendant to rescind the leave and to right of appeal, and cannot be raised in the statement of defence. (*Preston v. Lamont*, 45 L. J. Ex. 797.) It has been decided in one case under the J. Acts that an interlocutory judgment, for want of an appearance, signed without obtaining leave to proceed after service of the writ was regular. (*Scott v. The Royal Wax Candle Co.*, 45 L. J. Q. B. 586, L. R. 1 Q. B. 404.)

## CHAPTER XIII.

## APPEARANCE (a).

IF a defendant has no defence to the action he need not appear to the writ, in which case judgment will be signed against him by default as mentioned in chap. 16.

If the defendant intend to defend the action he should enter an appearance as required by the writ. He may, however appear at any time before judgment (O. 12, r. 15). In some cases, as mentioned in chap. 35, an appearance is entered in the district registry. Except where it is provided that the appearance must or may be in the district registry, it must be entered in London (O. 12, r. 1).

An appearance is entered for a defendant by delivering to the proper officer a memorandum in writing (b) dated on the day of delivering the same, and containing the name of the defendant's solicitor, and his address, or stating that the defendant defends in person, in which case his address must be given (R. 5, 23 Feb. 1876; O. 12, rr. 7, 8, 10). An address for service of the solicitor, or the defendant, must be given at a place not more than three miles from Temple Bar if the appearance is entered in the London office; and, if the appearance is entered in a district registry, an address for service must be given within the district (O. 12, r. 7, 8, 9). If any such address be illusory or fictitious, the appearance may be set aside by the court or a judge, on the application of the plaintiff (O. 12, r. 9). The officer enters the appearance in the cause book (O. 12, r. 9).

The names of all the defendants in the same action appearing by the same solicitor at the same time must be inserted in one memorandum (O. 12, r. 13). Where partners are sued in the name of their firm, they must appear individually in their own names. But all subsequent proceedings continue in the name of the firm (O. 12, r. 12). By r. 6, 26 June, 1876, where any person carrying on business in the name of a firm, apparently consisting of

(a) As to entering an appearance in an action for recovery of land, see chap. 30; as to appearance by an infant, &c., see *ante*, p. 38.

(b) See form Appendix Part 1, No. 6.

**PART IV.** more than one person, is sued in the name of the firm, he must appear in his own name; but all subsequent proceedings continue in the name of the firm.

When  
notice of  
appearance  
necessary.

If the writ issued out of a district registry and the defendant appears, as he may do in certain cases, in London, he must on the same day give notice of his appearance to the plaintiff's solicitor, or to the plaintiff himself, if he sues in person, either by notice in writing served in the ordinary way at the address for service within the district of the district registry, or by prepaid letter, directed to such address, and posted on that day in due course of post (R. 5, 23 Feb., 1876). So if the defendant appear after the time limited for appearance he must, on the same day, give notice thereof to the plaintiff's solicitor, or to the plaintiff himself if he sues in person, and he is not, unless the court or a judge otherwise orders, entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ (O. 12, r. 15).

A solicitor not entering an appearance in pursuance of his written undertaking so to do on behalf of any defendant is liable to an attachment (O. 12, r. 14).

## CHAPTER XIV.

## CERTAIN PROCEEDINGS WHERE WRIT SPECIALLY INDORSED.

WE have already noticed, *ante* p. 59, that where the plaintiff's claim is for a debt or liquidated demand in money, the writ may have a certain special indorsement on it. There are certain proceedings peculiar to the case where a writ is thus specially indorsed, which we will notice in this chapter. As to signing judgment for non-appearance to such a writ, see *post*, chap. 16.

Where the defendant appears to a writ thus specially indorsed, the plaintiff may, on affidavit made by himself, or by any other person (a) who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, call on the defendant to show cause before the court or a judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. The court or a judge may thereupon, unless satisfied by the defendant, by affidavit or otherwise, that he has a good defence to the action on the merits, or that sufficient facts are disclosed to enable him to defend, make an order empowering the plaintiff to sign judgment accordingly (R., May, 1877).

The application for leave to enter the judgment should, in the first instance, be made by summons returnable not less than two clear days after service (O. 14, r. 2). A copy of the affidavit must accompany the summons or notice of motion.

The defendant may show cause against such application by offering to bring into court the sum indorsed on the writ, or by affidavit, which must state whether the alleged defence goes to the whole or to part only, and if so, to what part, of the plaintiff's claim. And the judge may, if he think fit, order the defendant to attend and be examined upon oath; or to produce any books or documents or copies of or extracts therefrom (O. 14, r. 3).

"If it appear that the defence set up by the defendant

(a) *The Bank of Montreal v. Cameron*, 46 L. J. Q. B. 425, a case before this rule.

**PART IV.** applies only to a part of the plaintiff's claim ; or that any part of his claim is admitted to be due ; the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted to be due, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into court by the sheriff, the taxation of costs, or otherwise, as the judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim " (O. 14, r. 4).

If it appears to the judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former (O. 14, r. 5).

Leave to defend may be given unconditionally or subject to such terms as to giving security, or otherwise, as the court or a judge may think fit (O. 14, r. 6). Where there is a fair question in dispute whether there is a defence or not the defendant will not be required to bring money into court. (*Morris v. Levison*, 45 L. J. C. P. 409 ; *Runnacles v. Mesquita*, L. R. 1 Q. B. 416 ; 45 L. J. Q. B. 407.) It seems that in general a guarantor will be allowed to defend in order to have the case proved against him without bringing the money claimed into court, or giving security if there is no acknowledgment of the debt by him, or anything showing that the defence is merely for delay, and vexatious. (*Lloyd's Banking Co. v. Ogle*, 45 L. J. Ex. 606 ; L. R. 1 Ex. 262 : Bitt, 774, 100.)

As to removing an action from a district registry when the writ is specially indorsed, see chap. 35.

When it is unnecessary for the plaintiff to deliver a statement of claim where the writ is specially indorsed as above, is noticed chap. 15.

## CHAPTER XV.

## PLEADING.

IN this chapter we propose to consider the forms of pleadings, the times when same should be delivered, and the mode of delivering same.

Pleadings may be defined to be the formal written alterca-  
 tions between the parties to the action, which take place of.  
 for the purposes thereof, for ascertaining the material points  
 in controversy between the parties, so that it may be  
 known what there is to try. One of the first principles of  
 pleading is, that there is only occasion to state facts, which  
 is done for the information of the court, and for the purpose  
 of apprising the opposite party of what is meant to be relied  
 on. It is the duty of the court to declare the law arising  
 upon such facts.

At the time the Judicature Acts took effect the first plead-  
 ing, being the plaintiff's statement of his complaint against  
 the defendant, was called a declaration; the defendant's  
 pleading by way of answer thereto was called a plea, the  
 plaintiff's answer to the plea was called a replication, and  
 the subsequent pleadings were called respectively rejoinder,  
 rebutter, and sur-rebutter, beyond which pleadings seldom  
 went. There was also a pleading called a new assignment,  
 which was in the nature of a replication, and was used when  
 the plea was pleaded to a cause of action not sued for, but  
 which, by reason of the generality of the declaration, might  
 be supposed to be included therein. The new assignment  
 was pleaded for the purpose of correcting this mistake, and  
 pointed out the cause of action really sued for, distinguish-  
 ing it from that covered by the plea. Thus, if there had  
 been two assaults on the plaintiff by the defendant, one of  
 which was justifiable and the other not, and the declaration  
 complained only of one assault, if the defendant by his plea  
 treated the declaration as applying to the former assault, and  
 pleaded the justification thereto, the plaintiff might new as-  
 sign that he sued not for the assault pleaded to but for the  
 other assault. This new assignment was, in fact, a repeti-  
 tion of the declaration differing only in this, that it dis-  
 tinguished the true ground of complaint, as being different

Definition

Pleadings  
before  
Judicature  
Acts.

PART IV. from that which was covered by the plea. The defendant might plead to the new assignment in the same way as he could plead to the declaration. There was also a pleading called a demurrer which was used when a party insisted that his opponents pleading was bad in law, as showing no cause of action, or defence, or the like; thus, if the plaintiff's declaration showed no cause of action the defendant might demur to the same, and so if the plea offered no defence to the action the plaintiff might demur to the same.

Pleadings  
since  
Judicature  
Acts.

Now the first pleading is called a statement of claim, the answer thereto a statement of defence—the answer to this latter statement is termed a reply; and no pleading except a joinder of issue is allowed in answer to this without leave of the court or a judge. A demurrer is still used, but there is now no new assignment (*post*, p. 79). The rules as to the forms of pleading in use at the time of the passing of the Judicature Acts have been done away with, and a new system adopted in lieu thereof (O. 19, r. 1).

As a general rule all that is now required in pleading is that the plaintiff and defendant should state clearly and concisely (a) the material facts upon which they rely. The evidence by which the facts are to be proved should not be stated (O. 19, r. 4). This is a cardinal rule of pleading for the purpose of preventing prolixity of detail. The statements in the pleadings should be as brief as the nature of the case will admit, and the court in adjusting the costs of the action will inquire at the instance of any party into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same (O. 19, r. 2) (b). Wherever the contents of any document are material, it is sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words are material (O. 19, r. 24). Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it is sufficient to allege the same as a fact, without setting out the circumstances from which the same is to be inferred (O. 19, r. 25). Wherever it is material to allege notice to any person of any fact, matter, or thing, it is sufficient to allege such notice as a fact, unless the form or the precise terms of such notice be material (O. 19, r. 26). Wherever any contract or any relation between any persons does not arise from an express agreement, but is to be implied from a series of letters or conversations,

(a) See *Watson v. Rodwell*, 45 L. J. Ch. 744.

(b) And see r. 18, 12 Aug. 1875, *post*, ch. 25.



or otherwise from a number of circumstances, it is sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances, without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative (O. 19, r. 27). Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied. *E.g.*—Consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim (O. 19, r. 28).

The statements in every pleading must be divided into paragraphs, numbered consecutively, and each paragraph should contain, as nearly as may be, a separate allegation. Dates, sums, and numbers must be expressed in figures, and not in words. Signature of counsel is not necessary. Forms similar to those in Appendix (C) may be used (O. 19, r. 4).

Every pleading which contains less than 10 folios of 72 words each (every figure being counted as one word) may be either printed or written, or partly printed and partly written, and every other pleading, not being a petition or summons, must be printed (O. 19, r. 5 ; r. 9, 26 June, 1876) (a).

Having stated the above rules, which apply to pleadings generally, we will now consider the rules applicable particularly to the form of the plaintiff's statement of claim, which is the first step in the pleadings ; but first we will mention when it is necessary to deliver such statement. A delivery of this statement is not necessary if the defendant, at the time of his appearance, states that he does not require it (O. 19, r. 2). This rule is for the purpose of saving expense where the defendant knows what the plaintiff's claim is, and does not require any formal statement of claim. It seems also that a statement of claim is not necessary where leave has been given to a defendant to defend under O. 14, noticed *ante*, p. 71. By O. 21, r. 4, where the writ is specially indorsed, and the defendant has not dispensed with a statement of claim, it is sufficient for the plaintiff to deliver as his statement of claim a notice to the effect that his claim is that which appears by the indorsement upon the writ, unless the court or a judge order him to deliver a further statement. A form in which this notice may be is given by

When  
statement  
of claim  
necessary.

(a) See further as to printing proceedings, O. 12 Aug. 1875, *post*, ch. 39.

**PART IV.** the Act (a). It must be marked on the face of it in the same manner as is required in the case of an ordinary statement of claim. When the plaintiff is ordered to deliver such further statement it must be delivered within such time as by such order may be directed, and if no time be so limited then within the time prescribed by rule 1 of this Order, noticed *post*, p. 88. Except as above it is necessary for the plaintiff to deliver his statement of claim in order to proceed with the action (*Minton v. Metcalf*, 46 L. J. Ch. 584).

Form of  
statement  
of claim.

The above rules as to the form of pleadings generally, of course apply to the statement of claim (b). The plaintiff should, in his statement of claim, name the court or place in which he proposes that the action shall be tried (O. 36, r. 1, *post*, ch. 18). We have already noticed what causes of action may be joined in it. Every statement of claim must state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief. If the plaintiff's claim be for discovery only the statement of claim must show it (O. 19, r. 8). Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they should be stated, as far as may be, separately and distinctly (O. 19, r. 9). The plaintiff should not in his statement of claim anticipate a defence and answer it, as it may never be set up. He must not leap before he comes to the stile (*Hall v. Eve*, 46 L. J. Ch. 145).

Form of  
statement  
of defence  
and subsequent  
pleadings.

The defendant's pleading in answer to the statement of claim is called a statement of defence. Before the Judicature Acts there was a plea called a plea in abatement, which was not a plea denying the right of action, but which showed some grounds why the particular action could not be supported; for instance a plea of non-joinder of a co-contractor was a plea in abatement (c). By O. 19, r. 13, no plea or defence can be pleaded in abatement.

There are many rules in the Judicature Acts as to the forms of pleadings after the statement of claim which we will now notice.

If either party wishes to deny the right of any other party to claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he must deny the same specifically (O. 19, r. 11).

It is not sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim,

(a) See Appendix B. No. 3.

(b) See the forms in Appendix C.

(c) This is not now a defence, see O. 16, r. 5, *ante*, p. 34.

or for a plaintiff in his reply to deny generally the facts alleged in a defence by way of counter-claim ; but each party must deal specifically with each allegation of fact of which he does not admit the truth (O. 19, r. 20) ; therefore the defendant cannot plead, as formerly, never indebted or not guilty. By O. 19, r. 21, subject to the last preceding rule, the plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading. Such joinder of issue operates as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party joining issue may be willing to admit, and it then operates as a denial of the facts not so admitted.

When a party in any pleading denies an allegation of fact in the previous pleading, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it is not sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And so when a matter of fact is alleged with divers circumstances, it is not sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given (O. 19, r. 22). Where in an action for dissolution of partnership the plaintiffs stated a parol agreement to take a lease and carry on a partnership ; that, in pursuance of the agreement, the plaintiffs and defendant took the lease, and draft articles were prepared to define the terms of the partnership ; that, at an interview on a certain day, the articles were approved by the parties, subject to being revised and finally settled ; that the draft had not yet been revised, nor had the articles been executed ; that, although the draft articles were only settled subject to revision, the terms of the arrangement between the plaintiffs and defendant were definitely agreed upon at the interview ; and that the plaintiffs and defendant subsequently carried on the business ; and the defendant, by his statement of defence, admitted the agreement, and merely denied that the terms of the arrangement were definitely agreed upon as alleged :—Held, that the denial was evasive within the meaning of O. 19, r. 22, and upon motion by the plaintiffs for judgment on admissions of fact in the pleadings, a decree was made for dissolution of the partnership, and an inquiry what were the terms of the arrangement : *Thorp v. Holdsworth*, 45 L. J. 406 ; et per *Jessel*, M. R. (after refer-

PART IV. ring to the defendant's denial in his statement of defence), "Now that is evasive; 'as alleged' means the whole allegations of the statement of claim, not of the particular paragraph. I cannot tell from his pleading what part of the plaintiffs' allegations the defendant means to deny. He may mean to deny that the terms were definitely agreed upon at the interview of the 17th of September, although they were definitely agreed upon on some other day, or he may have some peculiar view as to the meaning of the word 'definitely.' He may not be able to say that the terms were not arranged as agreed upon, but he may take the word 'definitely' because he thinks it may give to him some mode of escape. I cannot make out what he means. He is bound, if he intends to deny, to deny that any terms of arrangement have ever been come to, if that is what he means. If he does not mean that, he should deny that any terms of arrangement were ever come to except the following, and then state what those terms were; otherwise, there is no specific denial."

When a contract is alleged in any pleading, a bare denial of the contract by the opposite party is to be construed only as a denial of the making of the contract in fact, and not of its legality—or its sufficiency in law, whether with reference to the statute of frauds or otherwise (O. 19, r. 23). If a party rely on the statute of frauds he should in his pleading make it clearly appear that he does so, and this it seems is so though the opposite party allege in his pleading that the agreement in question was in writing or the like (*Clarke v. Callow*, 46 L. J. Q. B. 53). The defence of the statute of frauds cannot be raised by demurrer (*Catling v. King*, 46 L. J. Ch. 384).

Every allegation of fact in a pleading, not being a petition or summons, if not denied specifically (a) or by necessary implication, or stated to be not admitted in the pleading of the opposite party, is to be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition (O. 19, r. 17).

There are many acts of parliament (b) which entitle or

(a) See *Thorp v. Holdsworth*, *supra*, O. 19, r. 20, *ante*, p. 76.

(b) By 21 J. 1, c. 4, s. 4, not guilty by statute may be pleaded in penal actions. By 11 & 12 Vict. c. 44, s. 17, justices of the peace may in certain cases plead this plea. By 5 & 6 Vict. c. 97, s. 3, so much of any clause or provision in any Act or Acts commonly called public, local, and personal, or local and personal, or in any Act or Acts of a local and personal nature, whereby any party or parties are entitled or permitted to plead the general issue only, and to give any special matter in evidence

permit a defendant to plead the general issue only, and to give any special matter in evidence without specially pleading the same. A plea of the general issue under such a statute is called a plea of not guilty by statute. Such a plea raises not only the defence peculiar to the statute under which it is pleaded, but also any other defence. The Judicature Acts do not affect the right of a defendant to plead not guilty by statute. And such plea or defence has the same effect as a plea of not guilty by statute had before the Act. But if the defendant so plead he cannot plead any other defence without the leave of the court or a judge (O. 19, r. 16). The defendant should insert in the margin of the plea the particulars of the statute on which he relies (R. 21, H. T. 1853).

By O. 19, r. 18, each party in any pleading, not being a petition or summons, must allege all such facts not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, as, for instance, fraud, or that any claim has been barred by the Statute of Limitations, or has been released.

By O. 19, r. 19, no pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim, or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same. Before the Judicature Acts there was a rule that there must be no departure in pleading. A departure took place when in any pleading the party deserted the ground he took in his last antecedent pleading and resorted to another. Sir Edward Coke says, "a departure in pleading is said to be when the second plea containeth matter not pursuant to his former, and which fortifieth not the same; and therefore it is called *decessus*, because he departeth from his former plea" (Co. Litt. 304 a): thus a replication must not have departed from the declaration, nor the rejoinder from the plea.

We have already stated, *ante*, p. 73, when, before the Judicature Acts, a new assignment was necessary. By O. 19, r. 14, no new assignment is now necessary or used. But everything which before the Judicature Acts was alleged by way of new assignment may now be introduced by amendment of the statement of claim.

From the above rules as to the forms of pleadings general Form of statement of defence.  
without specially pleading the same, shall be, and the same is, hereby repealed.

PART IV. rally, and as to the forms of pleadings subsequent to the statement of claim, it can be collected how the statement of defence should be framed. Forms are given by the Judicature Act, 1875, which see in the Appendix. Care should be taken not vexatiously to deny allegations of fact in the statement of claim, for by O. 22, r. 4, "Where the court or a judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the court may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted."

Counter-  
claim set-  
off.

The rule in the Judicature Act, 1875, which has made a great alteration in the law of set-off and counter-claim, should here be referred to. By O. 19, r. 3, "A defendant in an action may set-off, or set-up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages (a) or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the court or a judge may, on the application of the plaintiff before trial, if in the opinion of the court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof" (b). In an action for rent due under a lease in which there was a covenant for title, it was held that the defendant might set up a counter-claim for damages sustained by reason of the breach of such covenant, though the want of title related to a portion only of the demised property.

A counter-claim being in the nature of a cross action, may be good, although it does not cover the whole of the plaintiff's claim (*Mostyn v. The West Mostyn Coal and Iron Company, Limited*, 45 L. J. C. P. 401). In answer to a joint claim by two plaintiffs, a defendant may be allowed to set up separate demands by way of counter-claim against each plaintiff (*Manchester, dec., Rail. Co. v. Brooks*, 46 L. J. Ex. 244). In an action for an ordinary debt, Quain, J., struck out a counter-claim of damages for a slander.

(a) Before the Judicature Acts the statutes of set-off 2 G. 2, c. 22, s. 13; 8 G. 2, c. 24, s. 5, only applied where the claims on both sides were liquidated debts. They did not apply where the claim on either side was for unliquidated damages.

(b) See *Padwick v. Scott*, 45 L. J. Ch. 350, where a counter-claim which could not be decided without an administration suit, and brought in a third party, was struck out.

Where any defendant seeks to rely upon any facts as supporting a right of set-off or counter-claim, he must, in his statement of defence, state specifically that he does so by way of set-off or counter-claim (O. 19, r. 10) (a). By O. 19, r. 8, every statement of claim must state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief; and the same rule applies to any counter-claim made or relief claimed by the defendant in his statement of defence. By O. 19, r. 9, where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they must be stated, as far as may be, separately and distinctly. And the same rule applies where the defendant relies upon several and distinct grounds of defence, set-off, or counter-claim, founded upon separate and distinct facts. A defendant in an action for a debt may plead what amounts to never indebted and payment, and in an action for defamation may plead defences amounting to not guilty and justification (Bitt. 105, 46).

By O. 22, r. 5, where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other person or persons, he must add to the title of his defence a further (b) title similar to the title in a statement of complaint, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross (c) action, would be defendants to such cross action; and must deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff (*Treleaven v. Bray*, 45 L. J. Ch. 113). By O. 22, r. 6, where any such person as in the last preceding rule mentioned is not a party to the action, he must be summoned to appear by being served with a copy of the defence, and such service is regulated by the same rules as are hereinbefore contained with respect to the service of a writ of summons, and every defence so served must be indorsed in the Form No. 4 in Appendix (B), or to the like effect. Any person not a defendant to the action, who is served with a defence and counter-claim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action (O. 22, r. 7). Any person named in a defence as a party to a counter-claim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim

(a) How plea should be intituled, see O. 22, r. 5 *infra*; itt. 48.

(b) *Furness v. Booth*, 46 L. J. Ch. 112.

(c) See *Dear v. Swoorder*, 46 L. J. Ch. 100.

PART IV. (O. 22, r. 8). Where a defendant by his statement of defence sets up a counter-claim, if the plaintiff or any other person named in manner aforesaid as party to such counter-claim contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time before reply, apply to the court or a judge for an order that such counter-claim may be excluded, and the court or a judge may, on the hearing of such application, make such order as shall be just (O. 22, r. 9). See *Padwick v. Scott*, 45 L. J. Ch. 350, where a counter-claim which could not be decided without an administration suit, and brought in a third party, was struck out.

To an action by an administrator for a debt due to the intestate at his death, the defendant cannot set-off the amount of a promissory note made by the intestate in favour of the defendant, but which was not due until after the death of the intestate, and though the defendant has a good counter-claim for the amount of such note, yet if an order has been made in the Chancery Division to take an account of the debts and estate of the intestate, the administrator will be entitled to judgment for the full amount of the debt due to the intestate, and the defendant will be restrained from further proceedings in respect of his counter-claim, but with liberty to prove against the estate of the intestate for the principal and interest due on the promissory note (*Newell v. The Provincial Bank of England*, 45 L. J. C. P. 285; 23 & 24 Vict. c. 38, s. 14).

Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the court may, if the balance is in favour of the defendant, give judgment for him for such balance, or may otherwise adjudge to him such relief as he may be entitled to upon the merits of the case (O. 22, r. 10).

Although rectification or setting aside of deeds is assigned to the Chancery Division by the Judicature Act, 1873 (*ante*, p. 9), still a right to rectification, or to set aside a deed, may be set up as an answer to an action in one of the other divisions, by virtue of sec. 24, sub-sec. 2 of that Act, which gives an equitable jurisdiction to such other division to that extent (*Mostyn v. The West Mostyn Coal and Iron Co. Limited*, *supra*).

In any action (a) brought to recover a debt or damages,

Payment  
into court  
in satis-  
faction.

(a) The Common Law Procedure Act, 1852, s. 70, a former provision as to paying money into court, excepted actions of assault, false imprisonment, defamation, malicious prosecution, and seduction. As to a defendant in an action of libel in a newspaper paying money into court, see 6 & 7 Vict. c. 96, s. 2.



any defendant may at any time after service of the writ, and before or at the time of delivering his defence, or by leave of the court or a judge at any later time, pay into court a sum of money by way of satisfaction or amends (O. 30, r. 1). The money must be paid to the proper officer, who must give a receipt for the same. If the payment be made before delivering defence the defendant must serve upon the plaintiff a notice that he has paid in the money, and in respect of what claim, in the Form No. 5 in Appendix (B.). Payment into court must be pleaded in the defence, and the claim or cause of action in respect of which such payment is made must be specified therein (O. 30, r. 1). The plaintiff, if the payment into court is made before delivering a defence, may within four days after receipt of notice of such payment, or if such payment is first stated in a defence delivered then may before reply, accept the same in satisfaction of the causes of action in respect of which it is paid in; in which case he must give notice to the defendant in the Form No. 6 in Appendix (B.), and is at liberty, in case the sum paid in is accepted in satisfaction of the entire cause of action, to tax his costs, and, in case of non-payment within forty-eight hours, to sign judgment for his costs so taxed (O. 30, r. 4). *Broadhurst v. Wilby*, Bitt. 94; *Langridge v. Campbell*, 46 L. J. Ex. 277; see *Earp v. Henderson*, 45 L. J. Ch. 738, where the plaintiff did not accept the money paid into court in satisfaction.

Money paid into court as aforesaid may, unless otherwise ordered by a judge, be paid out to the plaintiff, or to his solicitor on the written authority of the plaintiff. No affidavit is necessary to verify the plaintiff's signature to such written authority unless specially required by the officer of the court (O. 30, r. 4).

Before the Judicature Acts a defence arising after the commencement of the action and before verdict might be pleaded. A plea of a defence which arose after plea pleaded, was called a plea *puis darrein continuance*. Now by O. 20, r. 1, any ground of defence which has arisen after (a) action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be pleaded by the defendant in his statement of defence, either alone or together with other grounds of defence. And if, after a statement of defence has been

Pleading defence arising after action brought.

(a) As to counter-claim in respect of damages accrued after date of writ, see *Original Hurtlepool Collieries Co. v. Gibb*, 46 L. J. Ch. 311.

PART IV. delivered, any ground of defence arises to any set-off or counter-claim alleged therein by the defendant, it may be pleaded by the plaintiff in his reply, either alone or together with any other ground of reply.

Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may, and where any ground of defence to any set-off or counter-claim arises after reply, or after the time limited for delivering a reply has expired, the plaintiff may, within eight days after such ground of defence has arisen, and by leave of the court or a judge, deliver a further defence or further reply, as the case may be, setting forth the same (O. 20, r. 2). Whenever any defendant, in his statement of defence, or in any further statement of defence as in the last rule mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence, which confession may be in the Form No. 2 in Appendix (B.), with such variations as circumstances may require, and he may thereupon sign judgment for his costs up to the time of the pleading of such defence, unless the court or a judge, either before or after the delivery of such confession, otherwise order (O. 20, r. 3). Where defendant, after the pleadings were complete, pleaded the plaintiff's bankruptcy after action brought, which defence the plaintiff confessed, it was held that the plaintiff was entitled to his costs under this rule (*Foster v. Gamgee*, 45 L. J. Q. B. 576).

Form of  
reply.

The forms of the plaintiff's reply to the statement of defence and of the subsequent pleadings can be gathered from what has already been said. As to joining issue upon the defence or other pleading, see O. 21, noticed *ante*, p. 77 (*Earp v. Henderson*, 45 L. J. Ch. 738; L. R. 3 Ch. 254). A plaintiff may both traverse and confess and avoid, by his reply; for instance, if a release of the plaintiff's claim be pleaded, he may reply that he did not execute it, or that if he did, his execution was procured by fraud (*Hall v. Eve*, 46 L. J. Ch. 145). As soon as either party has joined issue upon any pleading of the opposite party simply without adding any further or other pleading thereto, the pleadings as between such parties are deemed to be closed (O. 25).

Where in any action it appears to a judge that the pleadings do not sufficiently define the issues of fact in dispute between the parties, he may direct the parties to prepare issues, and such issues must, if the parties differ, be settled by the judge (O. 26).

If a party's pleading, or any part of it setting up a distinct cause of action, defence, &c., shows no cause of action or ground of defence or answer to the pleading to which it is pleaded, his opponent may demur, i.e., he may deliver a pleading, called a demurrer, which alleges that the objectionable pleading is bad in law (O. 28, r. 1). The Judicature Act, 1875, has several enactments with regard to demurrers.

A form of demurrer, which may be adopted, is given by that Act (a). It must state specifically whether it is to the whole of the pleading demurred to or to a part, and if so, to what part. It must also state some ground in law (b) for the demurrer, but the party demurring is not, on the argument of the demurrer, limited to the ground so stated. If no ground, or only a frivolous ground be stated, the court or judge may set aside the demurrer, with costs (O. 28, r. 2). A defendant demurring to part of a statement of claim, and putting in a defence to the other part, must combine such demurrer and defence in one pleading. And so in every case where a party entitled to put in a further pleading desires to demur to part of the last pleading of the opposite party, he must combine such demurrer and other pleading (O. 28, r. 2). A party may plead and demur to the same matter upon obtaining leave of the court or a judge to do so; such leave will be granted, if there is reasonable ground for the demurrer, or an order may be made reserving leave to the party demurring to plead after the demurrer is overruled, or such other order as may be just (O. 28, r. 5).

A demurrer must be delivered in the same manner and within the same time as any other pleading in the action (O. 28, r. 3). If a defendant obtain an extension of time for the delivery of his defence, he may demur within such extended time (*Hodges v. Hodges*, L. R. 2 Ch. 112; 45 L. J. Ch. 750).

While the demurrer is pending, the pleading demurred to cannot be amended, unless by order of the court or a judge; and no such order can be made except on payment of the costs of the demurrer (O. 28, r. 7). No joinder in demurrer is requisite.

The point raised by the demurrer is argued before and decided by the court. It must be entered for argument by delivering to the proper officer a memorandum of entry in the Form No. 29 in Appendix (C.) (O. 28, r. 13). When the demurrer is delivered, either party may enter it for

(a) Appendix C. No. 28.

(b) Bitt. 405.

**PART IV.** argument immediately, and the party entering it must on the same day give notice thereof to his opponent. If the demurrer is not entered and notice thereof given within ten days after delivery, and if the party whose pleading is demurred to does not within such time serve an order for leave to amend, the demurrer is to be held sufficient for the same purposes and with the same result as to costs as if it had been allowed on argument (O. 28, r. 6). There are rules of court as to delivering copies of the demurrer book (i.e., of the demurrer and pleading demurred to), and the points intended to be insisted upon to the judges (R. 16 H. T. 1853). After the demurrer has been entered for argument, the proper officer inserts the name of the case in a list called the Special Paper, and the case comes on in its turn for argument before a single judge sitting in court. The counsel for the party demurring commences the argument and has the reply. Where the demurrer is allowed upon argument, the party whose pleading is demurred to must, unless the court otherwise order, pay to the demurring party the costs of the demurrer (O. 28, r. 8). If a demurrer to the whole of a statement of claim be allowed, the plaintiff, subject to the power of the court to allow the statement of claim to be amended, must pay to the demurring defendant the costs of the action, unless the court otherwise order (O. 28, r. 9). Where a demurrer to any pleading or part of a pleading is allowed in any case not falling within the last preceding rule, then (subject to the power of the court to allow an amendment) the matter demurred to must as between the parties to the demurrer be deemed to be struck out of the pleadings, and the rights of the parties are the same as if it had not been pleaded (O. 28, r. 10). Where a demurrer is overruled the demurring party must pay to the opposite party the costs occasioned by the demurrer, unless the court otherwise direct (O. 28, r. 11). Where a demurrer is overruled the court may make such order and upon such terms as to the court shall seem right for allowing the demurring party to raise by pleading any case he may be desirous to set up in opposition to the matter demurred to (O. 28, r. 12).

Mode of  
and time  
for deliver-  
ing plead-  
ings.

Delivery of  
pleadings.

We will now refer to the mode of and the times prescribed for taking these different steps in pleading.

By O. 19, r. 6, "Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party, if he does not appear by a solicitor, but if no appearance has been

entered for any party, then such pleading or document (a) CHAP. XV. shall be delivered by being filed with the proper officer." By O. 19, r. 7, every pleading in an action shall be delivered between parties, and shall be marked on the face with the date of the day on which it is delivered, and with the reference to the letter and number of the action, the division to which and the judge (if any) to whom the action is assigned, the title of the action, the description of the pleading, and the name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor."

No pleading can be delivered in the long vacation unless directed by the court or a judge (O. 57, r. 4).

By O. 19, r. 30, "In actions for damage by collision between vessels, unless the court or a judge shall otherwise order, each solicitor shall, before any pleading is delivered, file with the proper officer a document to be called a preliminary act, which shall be sealed up and shall not be opened until ordered by the court or a judge, and which shall contain a statement of the following particulars:—

(a.) The names of the vessels which came into collision and the names of their masters.

(b.) The time of the collision.

(c.) The place of the collision.

(d.) The direction of the wind.

(e.) The state of the weather.

(f.) The state and force of the tide.

(g.) The course and speed of the vessel when the other was first seen.

(h.) The lights, if any, carried by her.

(i.) The distance and bearing of the other vessel when first seen.

(k.) The lights, if any, of the other vessel which were first seen.

(l.) Whether any lights of the other vessel, other than those first seen, came into view before the collision.

(m.) What measures were taken, and when, to avoid the collision.

(n.) The parts of each vessel which first came into contact.

If both solicitors consent, the court or a judge may order the preliminary acts to be opened and the evidence to be taken thereon without its being necessary to deliver any pleadings.

(a) *Dymond v. Croft*, 45 L. J. Ch. 612, L. R. 3 Ch. 512; *Merton v. Miller*, id. 613.

## PART IV.

Where it is necessary for the plaintiff to deliver a statement of claim, he must, unless otherwise ordered by the court or a judge, deliver it within six weeks from the time of the defendant's entering his appearance (O. 21, r. 1) (a). The plaintiff may, if he think fit, at any time after the issue of the writ or summons, deliver a statement of claim, with the writ or notice in lieu thereof, or at any time afterwards, either before or after appearance, and although the defendant may have appeared and stated that he does not require the delivery of a statement of claim. Where a plaintiff delivers a statement of claim without being required to do so, the court or a judge may make such order as to the costs occasioned thereby as shall seem just, if it appears that the delivery of a statement of claim was unnecessary or improper (O. 21, r. 1).

Where a statement of claim is delivered, the defendant must within eight days from its delivery, or from the time limited for appearance, whichever is last, deliver his defence; the time may be extended by the court or a judge (O. 22, r. 1). A defendant who has appeared in an action and stated that he does not require the delivery of a statement of claim, and to whom a statement of claim is not delivered, must deliver a defence within eight days after his appearance, unless such time is extended by the court or a judge (O. 22, r. 2). Where leave has been given to a defendant to defend under O. 14, noticed *ante*, p. 71, he must deliver his defence, if any, within such time as may be limited by the order giving leave to defend, or if no time is thereby limited, then within eight days after the order (O. 22, r. 2).

A plaintiff must deliver his reply, if any, within three weeks after the defence or the last of the defences have been delivered, unless the time is extended by the court or a judge (O. 24, r. 1).

No pleading subsequent to reply other than a joinder of issue can be pleaded without leave of the court or a judge, and then upon such terms as the court or judge think fit (O. 24, r. 2). By O. 24, r. 3, subject to the last preceding rule, every pleading subsequent to reply must be delivered within four days after the delivery of the previous pleading, unless the time be extended by the court or a judge.

As to the proceedings to be taken in default of pleading, see *post*, p. 94.

Amend-  
ment of  
pleadings.

Extensive powers of amendment of pleadings have been given to the court and a judge by the Judicature Acts.

(a) And see O. 19, r. 2. As to dismissing the action for want of delivery of statement of claim, see *post*, p. 94.

By O. 27, r. 1, "The court or a judge may, at any stage (a) of the proceedings, allow either party to alter his statement of claim or defence or reply, or may order to be struck out (b) or amended any matter in such statements respectively which may be scandalous (c), or which may tend to prejudice, embarrass, or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties": *Cargill v. Bower*, 46 L. J. Ch. 175.

The plaintiff may, without any leave, amend his statement of claim once at any time before the expiration of the time limited for reply, and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared (O. 27, r. 2). A defendant who has set up in his defence any set-off or counter-claim may, without any leave, amend such set-off or counter-claim at any time before the expiration of the time allowed him for pleading to the reply, and before pleading thereto, or in case there be no reply, then at any time before the expiration of twenty-eight days from the filing of his defence (O. 27, r. 3). Where any party has amended his pleading under either of the last two preceding rules, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the court, or a judge, to disallow the amendment, or any part thereof, and the court or judge, may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may seem just (O. 27, r. 4). Where any party has amended his pleading under rule 2 or 3 of this Order, the other party may apply to the court or a judge for leave to plead or amend his former pleading within such time and upon such terms as may seem just (O. 27, r. 5).

In all other cases not provided for as above, application for leave to amend any pleading may be made by either party to the court or a judge in chambers, or to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may seem just (O. 27, r. 6; *King v. Corke*, 45 L. J. Ch. 190). An order for

(a) *Budding v. Murdock*, 45 L. J. Ch. 213, L. R. 1 Ch. 42; *King v. Corke*, L. R. 1 Ch. 57, 45 L. J. Ch. 190.

(b) See *Watson v. Rodwell*, 45 L. J. Ch. 744, L. R. 3 Ch. (C. A.) 380; *Gelding v. Wharton Salt Works Co.*, L. R. 1 Q. B. C. A. 374.

(c) *Blake v. Albion Life Ass. Co.*, 45 L. J. C. P. 663; *Cashin v. Cradwick*, L. R. 3 Ch. (C. A.) 376.

PART IV. leave to amend becomes void if the party who obtained it does not amend within the time limited for that purpose by the Order, or if no time is thereby limited, then within fourteen days from the date of the Order, unless the time is extended by the court or a judge (O. 27, r. 7). An amended pleading, when amended, must be marked with the date of the Order, if any, allowing the amendment, and of the day on which such amendment is made, in manner following, viz.:  
 "Amended                      day of                      " (O. 27, r. 9).

A pleading may be amended by written alterations in the pleading which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them in writing would render the pleading difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the pleading as amended (O. 27, r. 8).

The amended pleading must be delivered to the opposite party within the time allowed for amending the same (O. 27, r. 10). No pleading can be amended during the long vacation unless directed by the court or a judge (O. 57, r. 4).



## CHAPTER XVI.

PROCEEDINGS IN DEFAULT OF APPEARANCE OR IN  
PLEADING (a).

- (a.) *For Default of Appearance.* . . . p. 92  
 (b.) *For Default of Pleading* . . . p. 94

Before considering the proceedings on judgment by default, it should be mentioned that if the defendant is sued as an executor or administrator he admits that he has assets by suffering judgment by default: therefore, if he has no assets, or not sufficient assets to meet the plaintiff's claim,

(a) As to the course to be adopted where an infant or person of unsound mind has not appeared, see *ante*, p. 40. As to the course to be pursued when there is a claim on the writ that an account be taken, see O. 15, r. 1, *ante*, p. 60. As to paying into court a sum admitted to be due to the plaintiff, see O. 30, *ante*, p. 83.

Where there is no defence to an action an agreement is sometimes entered into between the plaintiff and defendant by which the former agrees to give time for the payment of the debt and costs, and the latter agrees that if the same be not then paid judgment may be signed and execution issued. This arrangement can be carried out by means of a warrant of attorney, or *cognovit actionem*, or a judge's order. By the Debtors Act, 1869, ss. 24 & 25, a warrant of attorney to confess judgment in a personal action or *cognovit actionem* is invalid unless there is present a solicitor of the High Court of Justice on behalf of the person giving the same, expressly named by him and attending at his request to inform him of the nature and effect of such warrant or *cognovit* before the same is executed. The solicitor must subscribe his name as a witness to the due execution, and thereby declare himself to be solicitor to such person, and state that he subscribes as such solicitor. Sect. 26 of the above Act contains a provision for the filing of the warrant of attorney or *cognovit*, or a copy of the same, within twenty-one days of its execution, and declares that if this is not done the same is to be void.

Where the defendant has appeared by a solicitor the consent to a judge's order, authorising the plaintiff to sign judgment, must be given by the defendant's solicitor, or agent; and where the defendant has not appeared or has appeared in person, the defendant must attend before the judge and give his consent in person, or give a written consent attested by a solicitor acting on his behalf (R. 156, 157, H. T. 1853). This rule, however, does not apply where the defendant is a barrister, conveyancer, special pleader, or solicitor. SS. 27 & 28 of the above Act contain provisions for the filing of the order and, in some cases, of a copy of the same, within twenty-one days of the making of the same, and declare that if not so filed the order is to be void.

PART IV. he should plead *plene administravit*, or *plene administravit præter*, as the case may require. If the defendant plead *plene administravit*, or *plene administravit præter* alone, the plaintiff in his reply may either deny it or confess it, and pray judgment of assets *in futuro* upon the former plea, or upon the latter take judgment presently of the assets acknowledged to be in the hands of the defendant, and of assets *in futuro* for the residue. In either of such cases the plaintiff may sign judgment of assets *quando acciderint*, &c., after getting the damages assessed when necessary (a). When assets embraced by such judgment are in the hands of the executor, the plaintiff may proceed as mentioned *post*, ch. 24, 26. But if the defendant plead either of the pleas above-mentioned with some other defence to the same part of the claim to which such plea is pleaded, and the plaintiff deny both in his reply, the action proceeds to trial in the ordinary way ; or if the plaintiff deny the other defence, and confess the plea of *plene administravit*, &c., and pray judgment of assets *in futuro*, &c., the case must proceed to trial, and if the jury on the trial find for the plaintiff they will assess the damages. If the plaintiff take issue on a plea of *plene administravit*, and it be found against him, he cannot have judgment of assets *quando*, &c. See remarks as to the forms of judgment against an executor in chap. 24.

(a.) *For Default of Appearance.*

In some cases, where the defendant fails to appear as required by the writ of summons, the plaintiff may sign final judgment. In other cases he can only, in the first instance, sign an interlocutory judgment, and in this latter case he must get his damages assessed, or ascertained, before he can sign final judgment. Before taking proceedings upon default of appearance the plaintiff must file an affidavit of service of the writ, or of notice in lieu of service, as the case may be (O. 13, r. 2).

Where  
final judg-  
ment may  
be signed.

Where the plaintiff seeks merely to recover a debt, or liquidated demand in money, and the writ is specially indorsed, under O. 3, r. 6, *ante*, p. 59, the plaintiff may, in case of non-appearance by defendant in due time, sign final judgment (b) for any sum not exceeding the sum indorsed on the

(a) When damages can be assessed by a master, &c., see C. L. P. Act, 1852, s. 94 ; as to a writ of inquiry, see *post*, p. 93, n. (b).

(b) See chap. 24, as to entering final judgment.

writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs; but the court or a judge may set aside or vary such judgment upon such terms as may seem just (O. 13, r. 3). Where in such a case there are several defendants, and one or more of them appear to the writ, and another or others of them do not appear, the plaintiff may enter final judgment against such as have not appeared, and may issue execution upon such judgment without prejudice to his right to proceed with his action against such as have appeared (a) (O. 13, r. 4). CH. XVI.

Where the plaintiff's claim is for a debt or liquidated demand only, but the writ is not specially indorsed, as above, and the defendant fails to appear, no statement of claim need be delivered, and the plaintiff may file an affidavit of service or notice in lieu of service, as the case may be, and a statement of the particulars of his claim in respect of the causes of action stated in the indorsement upon the writ, and may, after the expiration of eight days, enter final judgment for the amount shown thereby, not exceeding the sum indorsed on the writ and costs to be taxed (O. 13, r. 5).

Where the plaintiff's claim is not for a debt or liquidated demand only, but for detention of goods and pecuniary damages, or either of them, and the defendant fails to appear to the writ, no statement of claim need be delivered, but interlocutory judgment may be entered and a writ of inquiry issue to assess the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons. But the court or a judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, be ascertained in any way in which any question arising in an action may be tried (b) (O. 13, r. 6).

(a) As to the former practice, see Common Law Procedure Act, 1852, s. 33.

(b) It will be noticed that in this case an interlocutory judgment only can be signed. This judgment establishes the plaintiff's right to recover something, but leaves the amount he is entitled to recover unascertained. In general the court or judge would direct the amount of damages, &c., to be ascertained by a reference to an official referee or the master, but in some cases it may be directed that the amount of damages be assessed before a judge and jury as upon an ordinary trial. A writ of inquiry will be necessary if no order be made. This is a writ in general directed to the sheriff of the county where the action if defended would have been tried. It is executed before the sheriff's deputy and a jury, who assess

## PART IV.

By O. 13, r. 9, in actions assigned by the Judicature Act, 1873, s. 34, to the Chancery Division and in probate actions, and in all other actions not by the rules in this order otherwise specially provided for in case the party served with the writ does not appear in due time, upon the filing by the plaintiff of a proper affidavit of service the action may proceed as if such party had appeared.

(b.) *Default in Pleading.*

We will now consider the mode of proceeding when a party makes default in pleading within the time limited for that purpose.

Where plaintiff makes default in delivering statement of claim.

If the plaintiff when bound to deliver a statement of claim, does not do so within the time allowed for that purpose (a), the defendant may apply to the court or a judge to dismiss the action with costs, who may order the action to be dismissed, or make such other order on such terms as may seem just (O. 29, r. 1). Sometimes on such application further time will be given for the delivery of the statement of claim (*Higginbotham v. Aynsley*, L. R. 1 Ch. 288; *Litton v. Litton*, L. R. 3 Ch. 793).

Where defendant makes default in delivering defence.

If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, deliver a defence or demurrer, the plaintiff may enter final judgment for the amount claimed, with costs (O. 29, r. 2; *Hooper v. Giles*, Bitt. 86). When the plaintiff's claim is as above, and there are several defendants, if one of them make default as above mentioned final judgment may be entered and execution issued against him without prejudice to the plaintiff's right to proceed with his action against the other defendants (O. 29, r. 3; *Jenkins v. Davies*, 1 Ch. 696).

If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant makes default as above mentioned, the plaintiff may enter an interlocutory judgment against the defendant, and a writ of inquiry must issue to assess the value of the goods and the damages, or the damages only, as the case may be. But the court or a judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, be ascertained in any way in which any question

the damages. The proceedings upon the execution of the inquiry are conducted much in the same way as on an ordinary trial before a judge and jury. After the sheriff has returned the inquisition to the court, final judgment is given for the amount assessed.

(a) As to this, see O. 21, r. 1, *ante*, p. 88.

arising in an action may be tried (a) (O. 29, r. 4). When the plaintiff's claim is as last-mentioned and there are several defendants, if one of them make default as above mentioned the plaintiff may enter an interlocutory judgment against such defendant, and proceed with the action against the others. And in such case, damages against the defendant making default must be assessed at the same time with the trial of the action or issues therein against the other defendants, unless the court or a judge shall otherwise direct (O. 29, r. 5). If the plaintiff's claim be for a debt or liquidated demand, and also for detention of goods and pecuniary damages, or pecuniary damages only, and the defendant makes default in delivering his defence or demurrer in proper time, the plaintiff may enter final judgment for the debt or liquidated demand, and also enter interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in R. 4, *supra* (O. 29, r. 6).

By O. 29, r. 10, in all other actions than those in the preceding rules of this order mentioned, if the defendant makes default in delivering a defence or demurrer, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the court shall consider the plaintiff to be entitled to (*The Provident Permanent Building Society v. Greenhill*, 45 L. J. Ch. 272; *Dymond v. Croft*, 45 L. J. Ch. 612). As to motions for judgment see *post*, chap. 22. By R. 11, where, in any such action as mentioned in the last preceding rule, there are several defendants, if one of them make such default as aforesaid, the plaintiff may either set down the action at once on motion for judgment against such defendant, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants.

If the plaintiff does not deliver a reply or demurrer, or any party does not deliver any subsequent pleading or a demurrer, within the period allowed for that purpose, the pleadings are deemed to be closed at the expiration of that period, and the statements of fact in the pleading last delivered are deemed to be admitted (O. 29, r. 12). In any case in which issues arise in an action other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the opposite party may apply to the court or a judge for such judgment,

Default in  
subsequent  
pleadings.

(a) See note (b), *ante*, p. 93.

PART IV. if any, as upon the pleadings he may appear to be entitled to. And the court may order judgment to be entered accordingly, or may make such other order as may be necessary to do complete justice between the parties (O. 29, r. 13).

Setting  
aside  
judgment. By O. 29, r. 14, any judgment by default, signed as above, may be set aside by the court or a judge, upon such terms as to costs or otherwise as such court or judge may think fit.

## CHAPTER XVII.

## INCIDENTAL PROCEEDINGS BEFORE TRIAL.

THERE are many interlocutory and incidental proceedings which take place in the course of an action before trial, some of which should be here noticed.

If the defendant has not sufficient information of the plaintiff's claim from the indorsement on the writ of summons or from his statement of claim, or if the particulars delivered in the action be not sufficiently specific, an order may be obtained for his delivering further particulars of his claim or demand. This order is obtained at chambers upon summons, as mentioned *ante*, p. 53. So if the plaintiff has not sufficient information of the defendant's counter-claim, or set-off, particulars of same may be obtained in the same way.

By O. 57, r. 6, "a court or a judge shall have power to enlarge (a) or abridge the time appointed by these rules or time for fixed by any order enlarging time for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed." Under this rule applications are frequently made at chambers for further time to deliver a pleading or the like.

The court or a judge may set aside or stay proceedings where the taking of the same is an abuse of the authority of the court, or where they are taken against good faith. And if an action be brought against a person for something done in the performance of a public duty, and there be clearly no foundation whatever for the same, the court will stay the proceedings if they consider the same frivolous and vexatious (*Dawkins v. Prince Edward of Saxe-Weimar*, 45 L. J., Q. B. 567).

If a proceeding is not in compliance with the rules and practice of the court, as if it be informal or taken too soon or too late, it may sometimes be set aside for irregularity.

(a) As to the costs of an application to extend time, see r. 22, 12 Aug. 1875.

**PART IV.** Thus a judgment by default signed before the prescribed time may be set aside. But an application to set aside proceedings for irregularity will not be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity. The application must in general be made at chambers, and not to the court. By O. 59, "non-compliance with any of these rules shall not render the proceedings in any action void unless the court or a judge shall so direct, but such proceedings may be set aside, either wholly or in part, as irregular, or amended, or otherwise dealt with in such manner as upon such terms as the court or judge shall think fit."

**Setting aside proceedings for irregularity.** So also applications are frequently made at chambers for leave to amend pleadings or other proceedings. The court and judges have extensive powers of amendment, as noticed in different parts of this work.

**Amendment.** By O. 51, r. 4, actions in any division or divisions may be consolidated by order of the court or a judge in the manner heretofore in use in the Superior Courts of Common Law (a).

**Consolidation of actions.** Applications to consolidate actions were most usually made in actions against underwriters upon policies of insurance. Where before the Judicature Acts several actions were brought upon the same policy of insurance, the court or a judge, upon application of the defendants, would grant a rule or order to stay the proceedings in all the actions but one, the defendants undertaking to be bound by the verdict in such action, and to pay the amount of their several subscriptions and costs if the plaintiff should recover. Such other terms were also imposed as the court or judge might think proper. The rule or order might be obtained notwithstanding the plaintiff refused his consent to it and if the action which was tried were determined in favour of the plaintiff, the other defendants might (if necessary) obtain a stay of proceedings in their several actions upon payment of the amount of their subscriptions and costs. It was at one time thought that a consolidation rule bound the plaintiff as well as the defendant, but afterwards a different doctrine was established, and it was held that after a consolidation rule had been obtained, and the defendant had obtained a verdict, the plaintiff might proceed in the other actions (*Doyle v. Douglas*, 4 B. & Ad. 544). As to consolidating actions before the Judicature Acts, see Chit. Arch. by Prentice, p. 1357.

Before the Judicature Acts if several actions between the

(a) See O. 16, r. 9, *ante*, p. 41.



same parties were brought for the same cause, or substantially CH. XVII.  
so, the court might stay the proceedings in all but one.

If the plaintiff *permanently* reside out of the jurisdiction of the court, an order may be obtained for staying the proceedings in the action until he give security for costs. A peer privileged from arrest, or a foreign ambassador or his servant, will not be ordered to give such security. Nor will a plaintiff be compelled to do so merely because he is a bankrupt or insolvent, unless he sue for the benefit of a third party; nor when his absence is only temporary. If there be several plaintiffs, and one of them reside within the jurisdiction, this security will not in general be ordered. The application for the security is made after the defendant has appeared, and in general before issue joined (R. 22, H. T. 1853). It is in general made at chambers and not to the court. By R. 7, 23 Feb., 1876, in any cause or matter in which security for costs is required, the security shall be of such amount, and given at such time or times, and in such manner and form as the court or a judge shall direct.

Only a few remarks will be made on the subject of arresting the defendant before judgment, as this course is now seldom adopted. Arresting  
defendant  
before  
judgment.

By the Debtor's Act, 1869, s. 6, arrest on mesne process was abolished, and now when the plaintiff, in any action in which, if brought before the commencement of this Act, the defendant would have been liable to arrest, proves at any time, before final judgment, by evidence on oath, to the satisfaction of a judge, that the plaintiff has good cause of action against the defendant, to the amount of fifty pounds or upwards, and that there is probable cause for believing that he is about to quit England, unless he is apprehended, and that his absence from England will materially prejudice the plaintiff in the prosecution of his action, such judge may, in a certain prescribed manner, order the defendant to be arrested and imprisoned for a period not exceeding six months, unless he sooner give the prescribed (a) security, not exceeding the amount claimed in the action, that he will not go out of England without leave of the court. When the action is for a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract, it is not necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his

(a) In general the security to be given by the defendant is a deposit in part of the amount, or a bond to the plaintiff by the defendant with two sureties (R. 7, M. T. 1869.) See form of order for arrest, App. (F.).

**PART IV.** action, and the security given (instead of being that the defendant will not go out of England) is to the effect that any sum recovered against the defendant in the action shall be paid, or the defendant rendered to prison, s. 6. The application for the order for the arrest is made *ex parte* to a judge at chambers upon affidavits.

The royal family, the servants of the queen, peers and peeresses, are privileged from arrest; ambassadors and other public ministers of foreign princes or states at this court, and their domestics and domestic servants, are also protected from arrest. Members of the House of Commons are so privileged during the session of parliament, and for a convenient time, it seems forty days, before and after it. The judges of the Supreme Court of Justice are privileged from arrest, and so are some other persons. A defendant may be arrested as above for a debt or money demand, or for unliquidated damages. A defendant cannot, in general, be so arrested for a tort, but in some cases a judge will order his arrest, where it clearly appears that the damages sustained by the plaintiff exceed £50.

Where an order for the arrest is made it must be endorsed with the name and place of abode of the plaintiff's solicitors, &c. (R. 6, M. T. 1869). It is taken, with a copy of the same, to the office of the sheriff's deputy, in London, with instructions to execute it. The arrest must be made within one calendar month from the date of the order, and within the county referred to in the same; but concurrent orders may be made for the arrest in different counties (See R. 6—10, M. T. 1869).

Persons as witnesses, barristers, solicitors, &c., connected with an action, and attending in the course of it, are privileged from arrest whilst going to, attending, and returning from court or a judge at chambers. Clergymen also have a privilege from arrest whilst performing divine service, and *eundo, et redeundo*. In other cases also there is this temporary privilege.

The defendant may, at any time after the arrest, apply to rescind or vary the order, or to be discharged from custody, or for such other relief as may be just (R. 6, M. T. 1869).

By R. 10, M. T. 1869, upon payment into court of the amount mentioned in the order, a receipt must be given by the proper officer, and upon receiving the bond, or other security, a certificate to that effect must be given, signed or attested by the plaintiff's solicitor: upon the delivery of such receipt or certificate to the sheriff the defendant is discharged out of custody.

Applications are frequently made, both by plaintiffs and defendants, during the pendency of an action for a discovery, or inspection of documents in the possession or control of the opposite party. By O. 31, r. 1, the plaintiff may, at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings, and a defendant may, at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may at any time, by leave of the court or a judge, deliver interrogatories in writing for the examination of the opposite party or parties, or any one or more of them, with a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer; but no party can deliver more than one set of interrogatories to the same party without an order for that purpose. Except under very special circumstances leave will not be given to a defendant to interrogate the plaintiff before the statement of defence (*Disney v. Longbourne*, 45 L. J. Ch. 532; L. R. 2 Ch. 704). By O. 31, r. 4, if any party to an action be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, an order may be made at chambers allowing the delivery of interrogatories to any member or officer of such corporation, &c. (*The Republic of Costa Rica v. Erlanger*, 45 L. J. Ch. 145). Interrogatories, the answers to which may tend to criminate, cannot be administered (*Atherley v. Harvey*, 46 L. J. Q. B. 518). Interrogatories may be in the Form No. 7 in Appendix (B.), with such variations as circumstances may require (O. 31, r. 3). If interrogatories are exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the same, and the answers thereto, will in the adjusting the costs of the action have to be borne by the party in fault (O. 31, r. 2).

Any party called upon to answer interrogatories, may, within four days after service of the same, apply at chambers to strike out any interrogatory, on the ground that it is scandalous or irrelevant (a) or is not put *bonâ fide* for the purposes of the action, or that the matter inquired after is not sufficiently material at that stage (b) of the action, or on any other ground; and the judge, if satisfied that any interrogatory is objectionable, may order it to be struck out (O. 31, r. 5).

(a) *Mansfield v. Childerhouse*, 46 L. J. Ch. 30.

(b) *Mercier v. Cotton*, 46 L. J. Q. B. 184, L. R. 1 Q. B. 442.

Ch. XVII.

Discovery  
and  
Inspection.

**PART IV.** Interrogatories must be answered by affidavit to be filed within ten days, or within such other time as a judge may allow (O. 31, r. 6). The affidavit must, unless otherwise ordered by a judge, if exceeding ten folios, be printed and may be in the Form No. 8 in Appendix (B.), with such variations as circumstances may require (O. 31, r. 7 ; r. 11, 26 June, 1876 ; *Webb v. Barnford*, 46 L. J. Ch. 288). Any objection to answering any interrogatory may be taken, and the ground thereof stated in the affidavit (O. 31, r. 8).

If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the court or a judge for an order requiring the party interrogated to answer, or to answer further, as the case may be ; and an order may be made requiring him to answer or answer further either by affidavit or by *viva voce* examination, as the judge may direct (O. 31, rr. 9 and 10). Any party may, at the trial, use in evidence any one or more of the answers of the opposite party to interrogatories without putting in the others. But in such case the judge may look at the whole of the answers, and if he is of opinion that any other of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in (O. 31, r. 23).

By O. 31, r. 11, the court or a judge (a) may at any time (b) during the pendency of an action or proceeding, order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such action or proceeding, as the court or judge shall think right ; and the court may deal with such documents, when produced, in such manner as may appear just. The court or a judge possesses under this rule no greater discretionary power to grant or refuse an order for the production of documents than that possessed by the Court of Chancery under 15 & 16 Vict. c. 86, s. 18 (c), as judicially interpreted prior to the coming into operation of the Judicature Acts. Thus defined, the power of the court or a judge to refuse an order for the production of a document is limited to documents which fall within some known rule of protection or privilege hitherto acted upon by the Court of Chancery, such as that of professional privilege. Professional, including what is sometimes called *quasi*-professional, privilege is the protection which is extended to a

(a) See *Roncliffe v. Leigh*, 46 L. J. Ch. 60.

(b) See *Cashin v. Cradock*, L. R. 2 Ch. 140.

(c) This is an Act to amend the practice in Chancery, and the above rule is framed from s. 18.

party in obtaining the advice of a solicitor or his assistance in the preparation and conduct of legal proceedings. And in determining what documents are within this privilege, the question is whether they were written directly or indirectly at the instance and for the use of the solicitor for the purposes of such advice and legal proceedings. Where the parties by consent submit the documents themselves to the judge at chambers, the decision at which the judge arrives on such inspection will be final (*Bustros v. White*, 45 L. J. Q. B. 642, L. R. 1 Q. B. 422; *English v. Tottie*, 45 L. J. Q. B. 138; *M'Corquodale v. Bell*, 45 L. J. C. P. 329). After litigation threatened, the defendants, an incorporated banking company, telegraphed to their agent abroad (who was aware that claims were pending), asking for full information; the manager, who telegraphed, stated that the information was sought for the purpose of laying it before company's solicitors: Held, that an answer to the telegram was not privileged from discovery (*Anderson v. The British Bank of Columbia*, 45 L. J. Ch. 449).

Any party may, without filing any affidavit, apply to a judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power, (a) relating to any matter in question in the action (O. 31, r. 12). The application must be made by summons (Bitt. 1). The affidavit to be made by a party against whom such order has been made, must specify which, if any, of the documents therein mentioned, he objects to produce, and it may be in the Form No. 9 in Appendix (B.), with such variations as circumstances may require (*Taylor v. Oliver*, 45 L. J. Ch. 774; O. 31, r. 13). It seems that the right to discovery is not limited to documents which may be made evidence, but extends to all which may throw light on the case (*Hutchinson v. Glover*, 45 L. J. Q. B. 120).

By O. 31, r. 14, every party to an action or other proceeding is entitled, at any time before or at the hearing thereof, to give notice in writing (b), to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the former, or of his solicitor, and to permit him or them to take copies thereof (c). A party not complying with such notice cannot

(a) *Fraser v. Burrows*, 46 L. J. Q. B. 501.

(b) The form must be in the Form No. 10 in Appendix (B.); O. 15, r. 1.

(c) A party taking a copy or extract of a document under a rule of court or special order has to pay the solicitor of the party producing it, at the rate of fourpence per folio for such copy or extract as he by writing may

PART IV. put the document in evidence on his behalf in such action or proceeding, unless he satisfy the court that it relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice. The party to whom such notice is given must, within two days from the receipt thereof, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, and stating which (if any) he objects to produce, and on what ground. Such notice may be in the Form No. 11 in Appendix (B.), with such variations as circumstances may require, *ante*, p. 103, n. (b), (O. 31, r. 16). If the party served with notice under rule 15 omits to give such notice of a time for inspection, or objects to give inspection, the party desiring it may apply to a judge for an order for inspection (O. 31, r. 17).

Every application for an order for inspection of documents must be to a judge; and, except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application must be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party (O. 31, r. 18).

If the party from whom discovery or inspection is sought objects to the same, the court or a judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection (O. 31, r. 19).

If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he is liable to attachment. He is also, if a plaintiff, liable to

require; and if the solicitor refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it without paying any fee for copying (O. 12 Aug. 1875).

have his action dismissed for want of prosecution (a), and, Ch. XVII. if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended (O. 31, r. 20). Service of an order for discovery or inspection made against any party on his solicitor is sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order (O. 31, r. 21). The solicitor upon whom such order is served, who neglects without reasonable excuse to give notice thereof to his client, is liable to attachment (O. 31, r. 22).

By the Common Law Procedure Act, 1854, s. 58, either party is at liberty to apply to the court or a judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which is material to the proper determination of the question in dispute (b).

O. 33 relates to Inquiries and Accounts. By this order the court or a judge may, at any stage of the proceedings, direct any necessary inquiries or accounts to be made or taken, though it appears that there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner (*Turquand v. Wilson*, L. R. 1 Ch. 85, 45 L. J. Ch. 104). Inquiries and Accounts.

Where the parties to an action are agreed as to the facts, and the only questions in controversy arising in the action are questions of law, they may, by O. 34, r. 1, after the writ of summons has been issued, concur in stating such questions in the form of a special case for the opinion of the court. The special case should be divided into paragraphs numbered consecutively, and must concisely state such facts and documents as may be necessary to enable the court to decide the questions raised thereby. Upon the argument of such case the court and the parties are at liberty to refer to the whole contents of such documents, and the court are at liberty to draw from the facts and documents stated in the case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial. Special case.

By r. 2 of the same Order, if it appear to the court or a judge, either from the statement of claim or defence or reply

(a) *The Republic of Liberia v. Roye*, 45 L. J. Ch. 297.

(b) As to ordering a plaintiff bringing an action for a railway accident to be examined by a medical man, see 31 & 32 Vict. c. 119, s. 26.

**PART IV.** or otherwise (a), that there is in any action a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the court or judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the court, either by special case or in such other manner as may be deemed expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.

Every special case must be printed by the plaintiff, and signed by the several parties or their solicitors, and filed by the plaintiff. Printed copies for the use of the judges must be delivered by the plaintiff (O. 34, r. 3) (b). No special case in an action to which a married woman, infant, or person of unsound mind is a party can be set down for argument without leave of the court or a judge, the application for which must be supported by sufficient evidence that the statements contained in such special case, so far as the same affect the interest of such married woman, infant, or person of unsound mind, are true (O. 34, r. 4). Either party may enter a special case for argument by delivering to the proper officer a memorandum of entry, in the Form No. 13 in Appendix (B.), and also if any married woman, infant, or person of unsound mind be a party to the action, producing a copy of the order giving leave to enter the same for argument (O. 34, r. 5). The name of the action in which the case is stated is inserted by the proper officer in a list kept for that purpose. The case comes on for argument before the court in its order. One counsel only on each side is heard. The order for stating the special case, or the case provides for the form of the order or judgment to be made or given.

It may as well here be stated that by 22 & 23 Vict. c. 63, courts in one part of Her Majesty's dominions may remit cases to courts in other parts thereof for their opinion on questions of law; and that by 24 Vict. c. 11, the superior courts may remit a case to a court of any foreign state with which Her Majesty may have made a convention for that purpose, for ascertaining the law of such state.

Order 52 relates to interlocutory orders as to mandamus,

(a) *Metropolitan Board of Works v. The New River Co.*, 45 L. J. Q. B. 759, 46 L. J. Q. B. 183, where the order was made before statement of claim delivered.

(b) This rule applies to a special case pursuant to 13 & 14 Vict. c. 35, an Act relating to proceedings in Chancery.



injunctions or interim preservation of property, &c. By this order, r. 1, "When by any contract a *prima facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the court (a) or a judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into court or otherwise secured." An application for an order under this rule may be made by the plaintiff at any time after his right thereto appears from the pleadings; or, if there be no pleadings, by affidavit or otherwise (R. 5).

CH. XVII.

Interim  
preserva-  
tion of  
property.

By O. 52, r. 2, the court or a judge, on the application of any party to an action, may make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as may seem desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once. The application by the plaintiff for an order under this rule may be made after notice to the defendant at any time after the issue of the writ of summons. If the application be made by any other party it must be made on notice to the plaintiff at any time after appearance by the party making the application (O. 52, r. 4).

Sale of  
goods of  
perishable  
nature.

By O. 52, r. 3, the court or a judge, upon the application of any party (b) to an action, and upon such terms as may seem just, may make an order for the detention (c), preservation, or inspection of any property, being the subject of such action, and for all or any of the purposes aforesaid may authorise any person or persons to enter upon or into any land or building in the possession of any party to such action, and for all or any of the purposes aforesaid may authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence (d). The application for an order under this rule is made in the same way and at the same time as the application for an order under r. 2, *supra*, is made.

Preserva-  
tion and  
inspection  
of property.

We have already noticed, *ante*, p. 30, Judicature Act, 1873, s. 25, sub-s. 8, which provides that a mandamus or injunction may be granted, or a receiver appointed by an interlocutory

Interlocu-  
tory man-  
damus and  
injunction.

(a) *Hyde v. Warden*, L. R. 1 Ex. 309.

(b) *Sargant v. Read*, 45 L. J. Ch. 206, L. R. 1 Ch. 600.

(c) *Taylor v. Eckersley*, 45 L. J. Ch. 527; *Velati v. Braham*, 46 L. J. C. P. 415.

(d) See C. L. P. Act, 1852, ss. 114, 115; C. L. P. Act, 1874, s. 58.

**PART IV.** order in all cases in which it appears to be just or convenient that such order should be made. An application for an order under this sub-section may be made to the court or a judge by any party. If made by the plaintiff, it may be made either *ex parte* or with notice; and if by any other party then on notice to the plaintiff, and at any time after appearance by the party making the application (O. 52, r. 4).

Paying  
amount  
claimed for  
lien into  
court.

By O. 52, r. 6, where an action is brought to recover specific property other than land, and the defendant does not dispute the plaintiff's title thereto, but claims a lien on the same for a sum of money, the court or a judge may, at any time after such claim appears from the pleadings, or, if there be no pleadings, by affidavit or otherwise, order that the plaintiff be at liberty to pay into court, to abide the event of the action, the amount of the lien, and such further sum (if any) for interest and costs as such court or judge may direct, and that upon such payment into court being made, the property claimed be given up to the plaintiff. This rule also gives a similar right to a defendant who seeks by way of counter-claim to recover such property, and the plaintiff claims a lien thereon.

Admis-  
sions.

In many cases it is advisable for a party to admit the facts alleged by his opponent in his pleading, or some of them. By O. 32, r. 1, any party to an action may give notice, by his own statement (a) or otherwise, that he admits the truth of the whole or any part of the case stated or referred to, in the statement of claim, defence, or reply of any other party. The admission of documents in order to prevent the necessity of proving them at the trial will be treated of in chap. 19.

Obtaining  
order that  
facts may  
be proved  
by affida-  
vit (b).

As a general rule, in the absence of any agreement between the parties and subject to the rules, the witnesses at the trial of an action, or at an assessment of damages, must be examined *viva voce* and in open court (O. 37, r. 1, *Perkins v. Slater*, 45 L. J. Ch. 224). A guardian *ad litem* may consent, on behalf of infants, without the leave of the court, to evidence being taken by affidavit instead of *viva voce* (*Fryer v. Wiseman*, 45 L. J. Ch. 199; *Knatchbull v. Fowle*, L. R. 1, Ch. 604). The court or a judge, however, may at any time, for sufficient reason, order that any particular fact may be proved by affidavit (c), or that an affidavit of a witness may

(a) When a statement in pleading not denied by the pleading of the opposite party is taken to be admitted, see O. 19, r. 17, *ante*, p. 78. As to the costs when facts are denied which ought to have been admitted, see O. 22, r. 4, *ante*, p. 80.

(b) As to affidavits, see *ante*, p. 50.

(c) See *Paterson v. Wooler*, 45 L. J. Ch. 274, L. R. 2 Ch. 586.

be read at the hearing or trial, on such conditions as may CH. XVII.  
 be thought reasonable. But where it appears that a party *bonâ fide* desires the production of a witness for cross-examination, and that he can be produced, an order cannot be made authorising the evidence of such witness to be given by affidavit (O. 37, r. 1).

Within fourteen days after a consent for taking evidence by affidavit as between the plaintiff and the defendant has been given, or within such time as the parties may agree upon, or a judge in chambers may allow, the plaintiff must file his affidavits, and deliver to the defendant or his solicitor a list thereof (O. 38, r. 1). The defendant within fourteen days after delivery of such list, or within such time as the parties may agree upon, or a judge in chambers may allow, must file his affidavits, and deliver to the plaintiff or his solicitor a list thereof (O. 38, r. 2). Within seven days after the expiration of the said fourteen days, or such other time as aforesaid, the plaintiff must file his affidavits in reply, which must be confined to matters strictly in reply, and must deliver to the defendant or his solicitor a list thereof (O. 38, r. 3).

When the evidence is taken by affidavit, a party desiring to cross-examine a deponent, may serve upon the party filing the affidavit a notice in writing, requiring the production of the deponent for cross-examination before the court at the trial. Such notice may be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as the court or a judge may specially appoint. If the deponent is not produced accordingly, his affidavit cannot be used as evidence unless by the special leave of the court (a). The party producing such deponent for cross-examination is not entitled to demand the expenses thereof in the first instance from the party requiring such production (O. 38, r. 4). The party filing the affidavit can compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined (O. 38, r. 4). The affidavits (unless they have been previously used in any proceeding without being printed) must be printed, and the notice of trial must be given at the same time as in other cases (O. 38, r. 6; O. 13, 12 Aug. 1875).

It is sometimes necessary or advisable to examine a witness before the trial, as where he is about to leave the country and will be absent at the time of the trial, or where he is dangerously ill and not expected to live, or the like. The court or a judge may at any time, for a sufficient

Examining  
witnesses  
before  
trial.

(a) *Meyrick v. James*, 46 L. J. Ch. 579.

**PART IV.** reason, order that any witness whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner (O. 37, r. 1); and by O. 37, r. 4, the court or a judge may, in any cause or matter, where it appears necessary for the purposes of justice, make an order for the examination upon oath before any officer of the court, or other person or persons, and at any place, of any person, and may order the deposition so taken to be filed in the court, and may empower any party to the cause or matter to give such deposition in evidence therein on such terms, if any, as the court or a judge may direct. By O. 1, 12 August, 1875, the depositions for use on a trial must be printed, unless otherwise ordered, or unless they have previously been used upon any proceeding without having been printed (O. 2, 12 August, 1875). The other enactments, giving power to examine witnesses before trial, and allowing their examinations under certain circumstances to be read in evidence at the trial, are noticed, *post*, p. 120.

Effect of  
marriage,  
death, &c.,  
of parties.

At common law the death of one of the parties to an action before final judgment, caused the same to abate. So the marriage of the plaintiff, being a woman, or the bankruptcy of the plaintiff, pending action, might be pleaded. This, however, before the Judicature Acts had, in certain cases, been altered (*a*). By O. 50, r. 1, an action does not abate by reason of the marriage, death, or bankruptcy (*b*) of any of the parties, if the cause of action survive or continue, nor does it become defective by the assignment, creation, or devolution of any estate or title *pendente lite*.

In case of the marriage, death, or bankruptcy of any party to an action, or devolution of estate by operation of law, the court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party to the action, or be served with notice thereof in such manner and form as hereinafter prescribed, and on such terms as may be just; and such order may be made for the disposal of the action as may be just (O. 50, r. 2).

In case of an assignment, creation, or devolution of any estate or title *pendente lite*, the action may be continued by

(*a*) See Common Law Procedure Act, 1852, ss. 135, 141, 152.

(*b*) See *Wright v. The Swindon, &c. Railway Co.*, 46 L. J. Ch. 199.

or against the person to or upon whom such estate or title Ch. XVII. has come or devolved (O. 50, r. 3).

Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of an action, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action, and such new party or parties, may be obtained *ex parte* on application to the court or a judge, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence (O. 50, r. 4).

An order so obtained shall, unless the court or judge shall otherwise direct, be served upon the continuing party or parties to the action, or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to the next two following rules, be binding on the persons served therewith, and every person served therewith who is not already a party to the action shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons (O. 50, r. 5).

Where any person who is under no disability, or under no disability other than coverture, or being under any disability other than coverture, but having a guardian *ad litem* in the action, shall be served with such order, such person may apply to the court or a judge to discharge or vary such order at any time within twelve days from the service thereof (O. 50, r. 6).

Where any person being under any disability other than coverture, and not having had a guardian *ad litem* appointed in the action, is served with any such order, such person may apply to the court or a judge to discharge or vary such order at any time within twelve days from the appointment of a guardian or guardians *ad litem* for such party, and until such period of twelve days shall have expired such order shall have no force or effect as against such last-mentioned person (O. 50, r. 7).

By the Judicature Act, 1873, s. 67, the provisions con-

**PART IV.** tained in the 7th & 8th sections of the County Court Acts, 1867, shall apply to all actions commenced or pending in the High Court of Justice in which any relief is sought which can be given in a County Court. By the above 7th section (a); in any action of contract brought in a superior court of common law where the claim indorsed on the writ does not exceed £50 (*Osborne v. Homburgh*, 45 L. J. Ex. 65), the defendant may, *within eight days from the service of the writ*, take out a summons calling on the plaintiff to show cause why the action should not be tried in the County Court, in which it might have been commenced, and unless good cause be shown to the contrary, the judge will so order. When an order is made the plaintiff lodges the writ and order with the registrar of the County Court, who appoints a day for the hearing, and gives notice thereof to the parties. The proceedings are taken in the County Court as if the action had been originally commenced there, and the costs after the making of the order are taxed on the scale in use in the County Courts.

Ordering  
action to  
be tried  
in County  
Court.

It seems also that, by the 19 & 20 Vict. c. 108, s. 26 (b), in any action of contract brought in the High Court of Justice, where the claim indorsed on the writ does not exceed £50, or where such claim, though it originally exceeded £50, is reduced by payment into court, payment, an admitted set-off, or otherwise, to a sum not exceeding £50, a judge of the High Court, on the application of either party after issue joined, may, on such terms as he thinks right, order that the action be tried in any County Court to be named by him. Where the trial takes place in a County Court under this section the registrar of the County Court certifies the result of the trial to the Master's office, and judgment is signed without any motion in the High Court of Justice (*Scutt v. Freeman*, 46 L. J. Q. B. 173).

Also in actions of tort brought in the High Court of Justice a defendant may, unless the case is fit to be brought in such court, where the plaintiff has no visible means of paying the defendant's costs if a verdict be not found for him, obtain an order for security for costs, &c., or if same be not given, for the trial of the cause in the County Court (30 & 31 Vict. c. 142, s. 10; J. A. 1873, s. 67).

Discontin-  
uance.

Order 23 states how an action may be discontinued by

(a) See the 8th sect. of the Act by which proceedings in Equity might be transferred to County Courts which might have been commenced therein.

(b) By 30 & 31 Vict., c. 142, this enactment is extended to the City of London Court.

the plaintiff. By this Order the plaintiff may, before receipt CH. XVII. of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action, or withdraw any part or parts of his alleged cause of complaint, and thereupon he must pay the defendant's taxed costs (a) of the action, or of the matter so withdrawn. Such discontinuance or withdrawal is not a defence to any subsequent action. Save as above, the plaintiff cannot withdraw the record (b) or discontinue the action without leave of the court or a judge; but the court or a judge may, before, or at, or after the hearing or trial, upon such terms as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out.

The court or a judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out. It is not competent to a defendant to withdraw his defence, or any part thereof, without such leave (O. 23).

By r. 10, 25 June, 1876, a defendant may sign judgment for the costs of an action if it is wholly discontinued, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued.

A poor person who had a cause of action might be admitted by the Court of Chancery to sue *in formâ pauperis*, and the court would assign him counsel and a solicitor, who, together with the officers of the court, must have acted gratis (11 H. 7, c. 12; 23 H. 8, c. 15, s. 3). The party applying so to be admitted had to swear that he was not worth £5, except his wearing apparel, and the matter in question in the cause. The order for admission to sue *in formâ pauperis* might be granted either at the commencement of the suit, or at any subsequent period of it. It had not a retrospective operation. A plaintiff suing as a pauper, in no case except where he omitted to proceed to trial pursuant to notice, was obliged to pay to the defendant costs incurred after the admission.

The practice as to suing *in formâ pauperis* in the superior courts of law had become almost obsolete at the time of the

(a) The defendant may sign judgment for these costs, r. 10, 26 June 1876, *post*, p. 114.

(b) By r. 9, 1 Dec. 1875, when a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing signed by the parties.

PART IV. passing of the Judicature Acts by reason of certain rules of court by which the plaintiff, if he succeeded, got no costs unless he obtained the order of the court or a judge for that purpose, and then he only recovered from the defendant such costs as he had paid or was liable to pay, and, consequently, he could not recover any fees to counsel or attorney (See R. 121, H. T. 1853 ; R. 28, T. T. 1855 ; and *Dewley v. The Great Northern Rail. Co.*, 24 L. J., Q. B. 25 ; 4 EL. & B. 341).

It is as well here, however, to say something as to the practice of the Court of Chancery upon this subject before the passing of the Judicature Acts, as in some cases parties may now sue or defend *in formâ pauperis*. The plaintiff might be so admitted by such court to sue as a pauper at any time after the bill had been filed or summons issued, and it seems that a married woman might apply to sue *in formâ pauperis* before bill filed if the draft bill had been settled and signed by counsel. The order to sue was made upon the presentation of a petition, under which was a certificate signed by counsel, that he conceived the case to be proper for relief in the court, and it was supported by an affidavit of the plaintiff of his poverty, as above mentioned. The counsel and solicitor assigned by the court to act for the pauper could not refuse to act without the leave of the judge who granted the admittance. After admittance no fee could be taken of the pauper by any counsel or solicitor for his services in the suit.

Whilst the order to sue or defend *in formâ pauperis* was in force the pauper was exempted from the payment of any fees in the offices of the court, except for office copies made therein, for which a charge of  $1\frac{1}{2}d.$  per folio was made. If at any time it were made to appear that the plaintiff had sufficient means, or that he acted vexatiously in the conduct of the suit, the court would dispauper him. The costs of a plaintiff suing as a pauper were in the discretion of the court, and where costs were ordered to be paid to a party suing or defending *in formâ pauperis*, they were taxed as dives costs, unless the court otherwise directed.

A defendant was allowed by the Court of Chancery to defend *in formâ pauperis* (though this was otherwise in a court of law) upon making a similar affidavit of poverty to that above mentioned. A defendant was not allowed so to defend when he was in possession of the property in dispute. No certificate of counsel was required to obtain an order allowing a defendant thus to defend. A person suing or being sued in a representative character was not in general allowed to sue *in formâ pauperis*. See *Parkinson v. Smith*, 24 L. J. Ch. 47.



We have already noticed, *ante*, p. 110, that an action does not abate by reason of the death of any of the parties if the cause of action survive or continue. If either party to an action, where the cause of action does not survive or continue, die between the verdict and the judgment, the latter may be entered within what was formerly two terms (a) after the verdict; and it seems the court have power, by virtue of their common law jurisdiction, of ordering the judgment to be entered up *nunc pro tunc* where the signing of it has been delayed by the act of the court. Thus if a party die after a demurrer has been set down for argument, and before it comes on in its order for argument, or whilst the court are considering of their judgment after argument, the court will allow judgment to be entered up after his death *nunc pro tunc*, in order that a party may not be prejudiced by the act or delay of the court.

CH. XVII.

Judgment  
*nunc pro  
tunc.*

(a) See *ante*, p. 16.

## PART V.

### NOTICE OF TRIAL AND PROCEEDINGS TILL JUDGMENT.

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#### CHAPTER XVIII.

##### NOTICE OF TRIAL; HEREIN OF VENUE AND MODES OF TRIAL.

BEFORE stating the practice as to giving notice of trial, it would be as well to mention where a trial is to take place, and the different modes of trial.

**Venue.**

There is now no local (*a*) venue for the trial of an action; but it is tried, unless a judge otherwise orders, in the county or place in which the plaintiff proposes in his statement of claim that the action shall be tried. Where no place of trial is named in the statement of claim, it is, unless a judge otherwise orders, the county of Middlesex. Any order of a judge, as to the place of trial, may be discharged or varied by a Divisional Court (O. 36, r. 1). Actions in the Chancery Division to be tried by jury will be tried in the county or place named in the statement of claim, or (if no place be named) will be placed in the list of actions for trial in the county of Middlesex in exactly the same way as actions in the Queen's Bench, Common Pleas, and Exchequer Divisions are so placed (*Warner v. Murdock*, 46 L. J. Ch. 121).

**Modes of trial.**

Actions are tried and heard before a judge or judges, or before a judge sitting with assessors (*b*), or before a judge and jury, or before an official or special referee, with or without assessors (O. 36, r. 2). This last mode of trial is considered in Chapter 36.

**Notice of trial.**

A notice of trial, unless dispensed with, is a necessary preliminary to the trial. By G. 36, r. 3, the plaintiff may,

(*a*) *Whitaker v. Forbes*, 45 L. J. C. P. 140.

(*b*) See Judicature Act, 1873, s. 56, *post*, Ch. 21.

with his reply, or at any time after the close of the pleadings, Ch. XVIII. give notice of trial of the action, and thereby specify one of the modes above mentioned; and the defendant, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a court or judge may allow, to the effect that he desires to have the issues of fact tried before a judge and jury, is entitled to have the same so tried (a). If the defendant gives such notice, an order cannot be made without his consent for trial by a judge sitting with assessors (*Sugg v. Silber*, 45 L. J. Q. B. 460; L. R. 1 Q. B. 362). Notice of trial must be given before entering the action for trial (O. 36, r. 10) (b). It must state whether it is for the trial of the action or of issues therein; and in actions in the Queen's Bench, Common Pleas, and Exchequer Divisions, the place and day for which it is to be (c) entered for trial. It may be in the Form No. 14 in Appendix (B.), with such variations as circumstances may require (O. 36, r. 8). Notice of trial for London or Middlesex cannot be or operate as for any particular sittings; but is deemed to be for any day after the expiration of the notice on which the action may come on for trial in its order upon the list (O. 36, r. 11). Notice of trial elsewhere than in London or Middlesex is deemed to be for the first day of the then next assizes at the place for which notice of trial is given (O. 36, r. 12). Ten days' notice of trial must be given, unless the party to whom it is given has consented to take short notice of trial; and is sufficient in all cases, unless otherwise ordered by the court or a judge. Short notice of trial is four days' notice (O. 36, r. 9).

No notice of trial can be countermanded, except by consent, or by leave of the court or a judge, which leave may be given subject to such terms as to costs, or otherwise, as may be just (O. 36, r. 13).

Subject to the rules, if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as a court or judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, and thereby specify one of the modes above mentioned; and in such case the plaintiff, on giving notice within four days from the time of the service of the

(a) *Clarke v. Cookson*, 45 L. J. Ch. 752.

(b) If the trial is to take place in London or Middlesex, and the cause be not entered for trial within six days after notice of trial given, the notice is no longer in force (R. 18, Dec. 1875).

(c) O. 12, 1 Dec. 1875.

**PART V.** notice of trial, or within such extended time as the court or a judge may allow, that he desires to have the issues of fact tried before a judge and jury, is entitled to have the same so tried (O. 36, r. 4). By r. 13, 26 June, 1876, the defendant, instead of giving notice of trial, may apply to the court or judge to dismiss the action for want of prosecution; who may order accordingly, or make such other order, and on such terms, as may seem just.

Order for  
mode of  
trial.

In any case in which neither the plaintiff nor defendant has given notice under the preceding rules that he desires to have the issues of fact tried before a judge and jury, or in any case within the 57th (a) section of the Act, if the plaintiff or defendant desires to have the action tried in any other mode than that specified in the notice of trial, he must apply to the court or a judge for an order to that effect, within four days from the time of the service of the notice of trial, or within such extended time as a court or judge may allow (O. 36, r. 5; *Lascelles v. Butt*, L. R. 2 Ch. 588). Subject to the rules, the court or a judge may, in any action at any time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the place or places (b) for such trial or trials, and in all cases may order that one or more issues of fact be tried before any other or others (O. 36, r. 6).

The court or a judge may, if it appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could, without any consent of parties, be tried without a jury (c) (O. 36, r. 26). The court or a judge may, if it appear either before or at the trial that any issue of fact can be more conveniently tried before a jury, direct that such issue shall be tried by a judge with a jury (O. 36, r. 27).

The court or a judge of the division to which the cause is assigned may, at any time, order the trial and determination of any question or issue of fact, or partly of fact and partly of law, by any commissioner or commissioners appointed in

(a) See this sect. which gives power to direct trials before referees, *post*, chap. 36.

(b) See Judicature Act, 1873, s. 26.

(c) *Clarke v. Cookson*, 45 L. J. Ch. 752; *Swindell v. The Birmingham Syndicate*, 45 L. J. Ch. 756. Query, whether in an action which must before the Judicature Acts have been brought in one of the Superior Courts of Law, the court can without consent direct a question of fact to be tried without a jury (*id.*) (*West v. White*, 46 L. J. Ch. 333).

pursuance of the 29th (a) section of the said Act, or at the Ch. XVIII.  
sittings to be held in Middlesex or London (O. 36, r. 29; *Swindell v. The Birmingham Syndicate*, 45 L. J. Ch. 756) (b).

(a) This is the section authorizing commissions of assize and other like commissions to be issued. See *ante*, p. 18.

(b) R. 4, Dec. 1876, provides for the form of order when an action in the Chancery Division is ordered to be tried in some other Division or at the assizes (*Warner v. Murdock*, 46 L. J. Ch. 121).

## CHAPTER XIX.

EVIDENCE ; SUBPENAING WITNESSES ; SUMMONING JURY,  
BRIEF, &c.

THERE are some incidental proceedings which usually take place between notice of trial and the trial, which are noticed in this chapter.

Admission  
of docu-  
ments.

In some cases it is advisable to call on the opposite party to admit a document necessary to be proved on the trial, for, by O. 32, r. 2, either party may call upon the other party to admit any document, saving all just exceptions ; and in case of refusal or neglect to admit, after such notice (a), the costs of proving any such document must be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the court certify that the refusal to admit was reasonable. No costs of proving any document are allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense. An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of the notice, and annexed to the affidavit, is sufficient evidence of such admissions (O. 32, r. 4).

The following important provision in the C. L. P. Act, 1854, s. 26, may here be noticed. By this section it is not necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite ; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto.

Notice to  
produce.

If any document which it is necessary to prove at the trial is in the possession of the opposite party, a notice to produce it at the trial should be served on him a reasonable time before the trial, and in some cases it may be as well to serve him with a subpoena *duces tecum* requiring him to produce it.

Examina-  
tion of  
witnesses  
before  
trial.

Order 37, referred to, *ante*, p. 109, has rendered the previous enactments as to examining witnesses before trial, and as to their examinations being read in evidence at the trial,

(a) The notice may be in the Form No. 12 in Appendix (B.) (O. 32, r. 3.)

of less practical importance than formerly. But as these enactments will still sometimes be acted on, and as they form a guide to the mode of procedure under the above order, they are here referred to. CH. XIX

By the 1 Will. 4, c. 22, s. 4, the High Court of Justice, or a Judge thereof, in any action depending in such court, upon the application of any of the parties thereto, may order the examination on oath, upon interrogatories or otherwise, before a master of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court: or may order a commission to issue for the examination of witnesses on oath, at any place or places out of such jurisdiction, by interrogatories or otherwise, and, by the same or any subsequent order or orders, may give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just.

An order may be made under this enactment to examine a witness within the jurisdiction where he intends to leave the country before the trial of the cause, and where the witness is so unwell that there is no probability of his being able to attend the trial. The application for the order is usually made at chambers, upon an affidavit showing the necessity for the examination.

By the 1 Will. 4, c. 22, s. 5, the court or judge may, where the witness is to be examined within the jurisdiction, by rule or order, command his attendance for the purpose of being so examined, or the production of any writing or other documents to be mentioned in such rule or order, and direct the attendance of the witness to be at his own place of abode, or elsewhere, if necessary or convenient so to do; and the wilful disobedience of any such rule or order is punishable by attachment, (the judge's order being made a rule of court before or at the time of the application for an attachment), if, in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, shall be also served together with or after the service of such rule or order: Every person whose attendance is so required is entitled to the like conduct-money, and payment for expenses and loss of time, as upon attendance at a trial: and no person is compelled to produce, under any such rule or order, any writing or other document that he would not be compellable to produce at a trial of the cause.

**PART V.** Section 6 provides for the case where the witness is in prison.

By 1 Will. 4, c. 22, s. 7, the person authorised to take the examination must take the same upon the oath of the witness, or affirmation in cases where affirmation is allowed by law instead of oath. The examiner should certify the examination and depositions under his hand, and must, if need be, make a special report to the court touching such examination, and the conduct or absence of any witness or other person thereon or relating thereto; and the court may institute such proceedings, and make such order and orders upon such report, as justice may require, and as may be instituted and made in any case of contempt of the court (1 Will. 4, c. 22, s. 8).

The 1 Will. 4, c. 22, s. 10, enacts, that no examination or deposition to be taken by virtue of this Act shall be read in evidence at any trial, without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable, from permanent sickness or other permanent infirmity, to attend the trial; in all or any of which cases, the examinations and depositions certified under the hands of the person or persons taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions. Objectionable questions or depositions, or any part of an objectionable question or deposition, may be excluded from the jury on the trial; but not so by the party who put them.

By 1 Will. 4, c. 22, s. 9, the costs of every rule or order to be made for the examination of witnesses under any commission or otherwise, by virtue of this Act, and of the proceedings thereupon, shall, except in the case hereinbefore provided for [s. 3, *post*, p. 125], be costs in the cause, unless otherwise directed either by the judge making such rule or order, or by the judge before whom the cause may be tried, or by the court.

Examina-  
tion of  
witnesses  
out of the  
jurisdic-  
tion.

As already noticed *ante*, p. 121, by the 1 Will. 4, c. 22, s. 4, the court or a judge may order a commission to issue for the examination of witnesses on oath at any place or places out of the jurisdiction of the court by interrogatories or otherwise. Unless under special circumstances, the application for a commission is made to a judge upon an affidavit shewing the necessity for it. The judge's order can be obtained only on a summons to shew cause. The rule or order is for the commission to issue for the examination of the witnesses



on oath, by interrogatories or *vivd voce*, or otherwise, as the court or judge may direct. The usual course is to order the examination upon written interrogatories, but a power is sometimes given to put additional questions *vivd voce* upon facts arising out of the answers to the interrogatories, and a power is frequently added to enable the opposite party to cross-examine the witnesses *vivd voce*; the rule or order generally requires the examinations and answers to be reduced into writing, and returned under the seals of the examiners, with the commission, to the office of the masters of the court; besides the witness or witnesses named in the affidavit, the court may direct generally an examination of any other witness who may be found at the place of the examination knowing anything of the matter. Where the application is made by the defendant, and it appears questionable whether it is not made to delay the plaintiff, the defendant will sometimes be required to bring the money sought to be recovered, or part of it, into court, or else that he give security for it to the satisfaction of the master. By the order for the commission or some subsequent order, the court or judge should give directions, touching the time, place, and manner of the examination, and other matters connected with it.

The commission is issued by getting it stamped at the proper office: it is tested of the day of issuing. The interrogatories and cross-interrogatories, if any, should be annexed to it. After the commission has been sued out, it should be forwarded, with instructions, to an agent, who will deliver it to the commissioners. The directions of the commission should be followed.

The 6 & 7 Vict. c. 82, s. 5, contains provisions for compelling the attendance of witnesses when they are to be examined in Scotland or Ireland before the commissioners. By 22 Vict. c. 20, s. 1, after reciting that it is expedient that facilities be afforded for taking evidence in or in relation to actions, suits, and proceedings pending before tribunals in her Majesty's dominions in places in such dominions out of the jurisdiction of such tribunals, it is enacted that, where, upon an application for this purpose, it is made to appear to any court or judge having authority under this Act, that any court or tribunal of competent jurisdiction in her Majesty's dominions has duly authorised, by commission, order, or other process, the obtaining the testimony in, or in relation to any action, suit, or proceeding pending in or before such court or tribunal, of any witness or witnesses out of the jurisdiction of such court or tribunal, and within the juris-

PART V. diction of such first-mentioned court, or of the court to which such judge belongs, or of such judge, it shall be lawful for such court or judge to order the examination before the person or persons appointed, and in manner and form directed by such commission, order, or other process, as aforesaid, of such witness or witnesses accordingly; and it shall be lawful for the said court or judge by the same order, or for such court or judge, or any other judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just, and any such order may be enforced, and any disobedience thereof punished, in like manner as in case of an order made by such court or judge in a cause depending in such court or before such judge. This Act contains provisions as to the payment of the expenses of the witnesses and as to the courts which have jurisdiction to compel their attendance, &c.

The commissioners to whom the commission is directed must examine the witnesses on oath or on affirmation where an affirmation is allowed. The examination should be conducted by the same rules as the examination of witnesses on a trial. The commissioners should return the commission and interrogatories with the depositions according to the time and mode directed by the commission, certified under their seals. As to the admissibility of the examinations on the trial, and as to the costs of the proceedings, see *ante*, p. 122.

The court has also power to direct a mandamus to issue for the examination of witnesses in India and in the colonies, islands, plantations, and places under the dominion of her Majesty in foreign parts (13 G. 3, c. 63, s. 40; 1 W. 4, c. 22, s. 1). A mandamus cannot be issued to examine a witness in Scotland or Ireland; for these are not "foreign parts" within the meaning of the 1 W. 4, c. 22, s. 1. The application for leave to issue this writ must be made to the court.

The mandamus is directed to the court which is to take the examinations. The 13 G. 3, c. 63, s. 40, states to what judges in India the mandamus is to be directed. A mandamus to Madras is directed to the Chief Justice and other judges of the Supreme Court of Judicature at Madras in the

East Indies. In other places than India the mandamus is directed to the judges of some court therein (1 W. 4, c. 42, s. 1). The writ is sued out by getting it stamped at the proper office. The party issuing the writ sends it out to his agent in the place where it is to be executed, with instructions to examine the witnesses, and he gets the writ executed.

By the 1 W. 4, c. 22, s. 2, when any writ or commission issues under the authority of 13 G. 3, c. 63, or of the power given by the 1 W. 4, c. 22, s. 1, the judge or judges to whom the same is directed have the like power to compel and enforce the attendance and examination of witnesses, as the court whereof they are judges possess for that purpose in suits or causes depending therein. By the 13 G. 3, c. 63, s. 40, the witnesses are to be examined on oath *viva voce* in the court to which the mandamus is directed, and their examinations are to be reduced into writing; and this section points out the way in which the examinations are to be returned to this country. The examinations being duly returned may be read in evidence on the trial of the action (see the latter parts of the 40th and 44th sects. of the 13 G. 3, c. 63). By 1 W. 4, c. 22, s. 3, the costs of the writ and of the proceedings thereon, are in the discretion of the court issuing the same.

A witness in England may be compelled to appear at the trial to give evidence by issuing a writ of *subpoena ad testificandum*, serving him with a copy of it a reasonable time before the trial, and at the same time shewing him the original writ and tendering or paying him his reasonable expenses of going to, staying at, and returning from the place of trial (a). A *subpoena duces tecum* is issued for the purpose of compelling a party to produce a document in his possession. If a party wilfully disobey a *subpoena* properly served upon him, he may be liable to an attachment if his expenses, where he is entitled to them, were duly tendered or paid; and in some cases to an action at the suit of the party on whose behalf he was called upon to testify. If a witness is in prison on civil process he may be compelled to appear to give evidence by means of a writ of *habeas corpus ad testificandum*; if otherwise a prisoner, one of her Majesty's principal Secretaries of State, or a judge of the Queen's Bench, Common Pleas, or Exchequer Divisions of

Compelling  
attendance  
of wit-  
nesses.

(a) In town causes where the witness lives within the weekly bills of mortality, the practice has been to pay or tender him 1s.

PART V. the High Court may issue a warrant or order for that purpose (16 & 17 Vict. c. 30, s. 9) (a).

By 17 & 18 Vict. c. 34, s. 1, "If, in any action or suit now or at any time hereafter depending in any of her Majesty's superior courts of common law at Westminster or Dublin, or the Court of Session or Exchequer in Scotland, it shall appear to the court in which such action is pending, or, if such court is not sitting, to any judge of any of the said courts respectively, that it is proper to compel the personal attendance at any trial of any witness (*Harris v. Barber*, 25 L. J. Q. B. 98) who may not be within the jurisdiction of the court in which such action is pending, it shall be lawful for such court or judge, if in his or their discretion it shall so seem fit, to order that a writ, called a writ of *subpoena ad testificandum* or of *subpoena duces tecum* or warrant of citation shall issue in special form, commanding such witnesses to attend such trial wherever he shall be within the United Kingdom, and the service of any such writ or process in any part of the United Kingdom shall be as valid and effectual to all intents and purposes as if same had been served within the jurisdiction of the court from which it issues."

By s. 2, "Every such writ shall have at foot thereof a statement or notice that the same is issued by the special order of the court or judge, as the case may be; and no such writ shall issue without such special order."

Sect. 3 states how witnesses making default are to be punished.

By s. 4 witnesses are not to be punished for making default unless a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evi-

(a) By this enactment "it shall be lawful for one of her Majesty's principal Secretaries of State, or any judge of the Court of Queen's Bench or Common Pleas, or any baron of the Exchequer, in any case where he may see fit to do so, upon application by affidavit, to issue a warrant or order under his hand for bringing up any prisoner or person confined in any gaol, prison, or place, under any sentence, or under commitment for trial or otherwise (except under process in any civil action, suit, or proceeding) before any Court, judge, justice or other judicature, to be examined as a witness in any cause or matter, civil or criminal, depending or to be inquired of, or determined in or before such Court, judge, justice, or judicature; and the person required by any such warrant or order to be so brought before such Court, judge, justice, or other judicature, shall be so brought under the same care and custody, and be dealt with in like manner in all respects, as a prisoner required by any writ of *habeas corpus* awarded by any of her Majesty's superior Courts of law at Westminster to be brought before such Court to be examined as a witness in any cause or matter depending before such Court, is now by law required to be dealt with."

dence, and of returning from giving such evidence, has been Ch. XIX.  
tendered to such person at the time when such writ of *sub-*  
*pœna* was served.

By the Common Law Procedure Act, 1852, the several Summoning  
writs of *venire facias juratores*, and *distringas juratores*, or jury (a).  
*habeas corpora juratorum*, and the entry *jurata ponitur in*  
*respectu*, are no longer necessary or used. These are the  
writs by which a jury were formerly summoned and com-  
pelled to appear.

By the Common Law Procedure Act, 1854, s. 59, the  
court or a judge may make all such rules or orders upon  
the sheriff or other person as may be necessary to procure  
the attendance of a special or common jury for the trial of  
any cause or matter depending in the court at such time  
and place and in such manner as they or he may think fit.  
(See also the latter part of s. 107 of the C. L. P. Act, 1852.)

Now, in London and Middlesex, common jurors are sum-  
moned by the sheriff by virtue of a precept issued by a judge.  
In country cases they are summoned under a precept issued  
by the judges of assize (C. L. P. Act, 1852, ss. 105, 107 ;  
Juries Act, 1870). A sufficient number of jurors are sum-  
moned to try all the causes at the sittings or assizes. A  
printed panel of the jurors summoned is kept in the sheriff's  
office for seven days before the first day of the sittings or  
assizes, for the inspection of the parties or their solicitors ;  
and a copy of same is delivered to any party requiring it.

Sometimes a party to an action wishes to have the same  
tried by a special jury. By the Common Law Procedure Act,  
1852, s. 109, in any county, except London and Middlesex,  
the plaintiff in any action, except replevin, can have it tried  
by a special jury, upon giving notice in writing to the de-  
fendant, at such time as is necessary for a notice of trial, of  
his intention that the cause be so tried ; and the defendant  
or plaintiff in replevin can have the action so tried on giving  
the like notice within a certain time ; and the court or a  
judge may at any time order that a cause be tried by a spe-  
cial jury, upon such terms as may be thought fit. By s. 112,  
where notice has been given to try by special jury, either  
party may, six days before the commission day, give notice  
to the sheriff that the cause is to be tried by a special jury,  
and in default thereof, no special jury need be summoned,  
and the cause may be tried by a common jury, unless other-  
wise ordered by the court or a judge. The sheriff is directed  
by the precept from the judges of assize to summon a suffi-

(a) The Judicature Acts do not affect the law relating to jurymen or  
juries (J. A., 1875, s. 20 ; J. A. 1873, s. 72).

**PART V.** cient number of special jurors, not exceeding forty-eight in all, to try the special jury causes at the assizes, and a printed panel is kept, and delivered out as in the case of common jurors.

By the Juries Act, 1870, s. 18, in London and Middlesex there is the same power of ordering a cause to be tried by a special jury as exists with reference to other counties. By s. 16, in London and Middlesex a sufficient number of special jurymen, not less than thirty for each court, are to be summoned to try the special jury causes triable at the sittings. The jurymen are so summoned in pursuance of a precept from a judge. A printed panel of the jurors so summoned is made, and it seems a copy thereof should be left with the pleadings when the action is entered for trial. By s. 17, the old practice of nominating and reducing special jurors in London and Middlesex is abolished; but the court or judge has power to order that a special jury be struck according to the former practice, and such order is a sufficient warrant for striking such jury and making a panel thereof for the trial of the particular cause. As to the former practice, see RR. 44, 45, H. T. 1853; C. L. P. Act, 1852, ss. 110, 111, 112; Chit. Arch. by Prentice, p. 368.

The court or a judge may in country cases direct that a special jury be struck according to the old practice, which was much the same as that adopted in London and Middlesex.

A party at whose instance the special jury is summoned, though successful in the action, has to bear all his own additional expenses attendant on a trial by such jury, unless the judge who tries the cause within a reasonable time after the verdict is pronounced certify on the back of the record that the case was proper to be tried by a special jury.

View by jury.

Even before the Common Law Procedure Act, 1854, a rule for a view by six or more of the jury might in some cases be obtained; as in actions of a local nature, such as trespass *quare clausum fregit*, nuisance, and the like (4 A. c. 16, s. 8; 6 G. 4, c. 50, s. 23. *Stone v. Menhem*, 2 Ex. 382). The practice as to obtaining a view under these Acts is regulated by the Common Law Procedure Act, 1852, s. 114; RR. 48, 49, H. T. 1853. The rule is drawn up by the officer of the court, without any motion for that purpose, upon an affidavit stating the place where the view is to be made, and the distance thereof from the office of the under-sheriff; the name of the showers (who are often the solicitors for the parties) being named therein. A deposit of money with the under sheriff to defray the expenses of the view has

to be made. The sheriff returns the names of the viewers CH. XIX. to the associate or other proper officer for the purpose of their being called as jurymen on the trial.

By the Common Law Procedure Act, 1854, s. 58, either party shall be at liberty to apply to the court or a judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the court, or a judge, if they or he think fit, to make such rule or order, upon such terms as to costs and otherwise as such court or judge may direct: Provided always that nothing herein contained shall affect the provisions of the "Common Law Procedure Act, 1852," or any previous Act, as to obtaining a view by a jury: Provided also, that all rules and regulations now in force and applicable to the proceedings by view under the said last-mentioned Act shall be held to apply to proceedings for inspection by a jury under the provisions of this Act, or as near thereto as may be.

The facts of the case, with any necessary observations The Brief. respecting the same, should be stated in the brief; and there should also be stated therein what the witnesses for the party on whose behalf the brief is prepared can prove. Sometimes also it is advisable to give in the brief hints for the cross-examination of the witnesses expected to be called on the other side. Printed copies of the pleadings, and also copies of other documents (such as notices to admit and produce), which it is necessary for counsel to have, should accompany the brief when delivered to counsel.

## CHAPTER XX.

## ENTRY OF CAUSE FOR TRIAL.

IF notice of trial is given for elsewhere than in London or Middlesex, either party may enter the action for trial. If both parties enter the action for trial, it is tried in the order of the plaintiff's entry (O. 36, r. 15). The party entering the action for trial must deliver to the officer two copies of the whole of the pleadings in the action, one of which is for the use of the judge. Such copies must be in print, except as to such parts, if any, of the pleadings as are by these rules permitted to be written (O. 36, r. 17; O. 14, 1 Dec. 1875; chap. 39). It seems also that a copy of the panel of the jurors summoned by the sheriff ought to be left with a copy of the pleadings when the case is to be tried at the assizes.

In town causes, a copy of the jury panel is obtained from the usher of the court just before the cause is called on, and then given to the officer in court who has the charge of the pleadings, for the purpose of the same being annexed thereto. If the party giving notice of trial for London or Middlesex omits to enter the action for trial on the day or day after giving notice of trial, the party to whom notice has been given may, unless the notice has been countermanded under rule 13, *ante*, p. 117, within four days enter the action for trial (O. 36, r. 14). By r. 13, 1 Dec. 1875, unless within six days after notice of trial is given the cause be entered for trial by one party or the other, the notice is no longer in force. This rule does not apply to trials not in London or Middlesex. The lists of actions for trial at the sittings in London and Middlesex respectively are prepared and the actions are allotted for trial without reference to the Division of the High Court to which such actions may be attached (O. 31, r. 16).

By r. 9, 1 Dec. 1875, when a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing, signed by the parties (*ante*, p. 113).



## CHAPTER XXI

## TRIAL.

By the Judicature Acts, as already mentioned, actions are to be tried and heard either before a judge or judges (*a*), or before a judge sitting with assessors, or before a judge and jury, or before referees (*b*). We will first consider the ordinary mode of trial before a judge and jury.

(*a.*) *Trial by Judge and Jury.*

In London and Middlesex an action is tried at the sittings When and which are held as mentioned *ante*, p. 15. In other counties the where. trial takes place at the assizes, which are held as mentioned *ante*, p. 18. Every trial of any question or issue of fact by a jury is held before a single judge, unless specially ordered to be held before more (O. 36, r. 7). And it may be here observed that a judge or commissioner on circuit when engaged in trying an action is a court of the High Court of Justice (J. A. 1873, s. 29).

Causes are entered in a list, and are tried in their order. The judge at the trial may, however, postpone the trial upon such terms as he thinks fit (O. 36, r. 21). The plaintiff cannot withdraw the record without the consent of the defendant or the leave of the judge (see *ante*, p. 113). When the cause is called on for trial, the jury, which is a common or special jury returned by the sheriff (*c*), are empanelled and sworn to try it. The parties have certain rights of challenging the jury; as to which, some remarks should be made.

When a full jury appear, either party may challenge them Challenging for cause. Challenges are of two kinds—to the array, or to jury. the polls; and each of these is again sub-divided into principal challenges, and challenges to the favour.

(*a*) As to a trial at bar, see Chit. Arch. by Prentice, Vol. 1, p. 376.

(*b*) As to trial before referees, see *post*, chap. 36. As to trying a case in a County Court, see *ante*, p. 112.

(*c*) As to the qualification of jurors, see 6 G. 4, c. 50; 33 & 34 Vict. c. 77. The law relating to juries and jurymen is not affected by the Judicature Acts (J. A. 1875, s. 20; J. A. 1873, s. 72).

**PART V.** A challenge to the array is an objection to all the jurors returned by the sheriff, collectively, not for any defect in them, but for some partiality or default in the sheriff, or his officer, who arrayed the panel. This is either a principal challenge, or a challenge to the favour. If the cause of a principal challenge be proved, nothing is left for the judgment of the triers; but a challenge for favour is left to the discretion and conscience of the triers. The causes of principal challenge to the array are such as the following: viz., that the sheriff or other returning officer is of kindred or affinity to the plaintiff or defendant, if the affinity continue; that an action of battery is pending at the suit of the plaintiff or defendant against the sheriff, or at the suit of the sheriff against the plaintiff or defendant; that an action of debt is pending at the suit of the plaintiff or defendant against the sheriff, but not if by the sheriff against the plaintiff or defendant; that the sheriff or returning officer holds land depending upon the same title with that in litigation between the parties; that the sheriff, &c., is counsel, solicitor, officer, or servant of either party; or is an arbitrator in the same matter, and has treated thereof. The causes of challenge to the array for favour are such as imply at least a probability of bias or partiality in the sheriff, but do not amount to a principal challenge; thus, that the plaintiff or defendant is tenant to the sheriff; or that the son of the sheriff has married the daughter of the plaintiff or defendant; or the like (*Co. Litt.* 156). It seems doubtful if the array in special jury causes can be challenged.

A challenge to the polls is an exception to one or more of the jurors who have appeared individually; and this is either a principal challenge, or a challenge to the favour. A challenge to the polls does not often occur in practice, as the associate or other officer calling the jury, upon the plaintiff or defendant intimating to him an objection to any particular person in the panel, will in general refrain from calling him. The following, amongst others, are causes of principal challenge to the polls—that the juror is not qualified to serve upon a jury; that he is within the age of twenty-one (*Co. Litt.* 157, 6 G. 4, c. 50, s. 1); or that he is an idiot or lunatic (*Gilb. C. B.* 95); that the juror is of kin to either party within the ninth degree (*Finch, L.* 401; *Barrett v. Long*, 3 H. L. Cas. 395); or, according to Ch. J. Coke, however remote the kindred (*Co. Litt.* 157); that there is affinity or alliance by marriage between the juror and one of the parties, if such affinity continue, or there be issue of the marriage alive; for otherwise it would be but a

challenge to the favour (Co. Litt. 157);—that the juror is CH. XXI.  
 godfather to the party's child, or the party godfather to the juror's child;—that the juror has land which depends upon the same title as the land in question;—that the juror has an interest in the action, direct or collateral;—that he is counselor or servant of either party (Co. Litt. 157);—that he is tenant of either party (Gilb. C. B. 95);—that he has declared his opinion of the case beforehand (2 Hawk. c. 43, s. 28);—that since he has been returned, he has eaten or drunk at the expense of one of the parties (Co. Litt. 157);—that one of the parties has laboured the juror, and given him money or other things for giving his verdict;—that he has committed some act, whereby he has ceased to be, in consideration of law, *probus et legalis homo*: thus, that he has been attainted of treason or felony, or convicted of any crime that is infamous, unless he has obtained a free pardon; or that he is under outlawry (33 & 34 Vict. c. 77, s. 10).

The challenge to the polls *for favour* is of the same nature with the principal challenge *propter affectum*, that is when such challenge is by reason of some supposed bias or partiality, but of an inferior degree. The general rule of law is, that the juror shall be indifferent; and if it appear probable that he is not so, this may be made the subject of challenge, either principal or to the favour, according to the degree of probability of his being biased. The cause of a principal challenge to the polls, we have seen, is such matter as carries with it, *prima facie*, evident marks of suspicion either of malice or favour. But when, from circumstances, it appears probable that a juror may be biased in favour of or against either party, and yet such circumstances do not amount to matter for a principal challenge, it may then be made a challenge to the favour.

No challenge, either to the array or to the polls, can be made before a full jury have appeared. It is immaterial which party challenges first; but the party who first begins to challenge must finish all his challenges before the other begins. Also the challenges of the party who challenged first are first tried. If a juror be challenged, and the challenge tried and overruled, he may still be challenged by the opposite party (Co. Litt. 158).

A challenge to the array or to the polls ought to be propounded in such a way at the trial, that it may be then put upon the record, so that the other party may either demur, or counterplead, or deny the matter of challenge (*Mayor, &c., of Carmarthen v. Evans*, 10 M. & W. 274). If the challenge

PART V. be demurred to, the party challenging joins in the demurrer and the matter is determined by the court.

It lies entirely in the discretion of the court how challenges to the array shall be tried; sometimes they are tried by two of the jury (2 Hale, 275). If the challenge, however, be a principal challenge, it may be tried by the court itself, without the aid or intervention of triers. If the array be quashed as to the sheriff, the jury will be summoned by the coroner: if quashed as to the coroner, then the jury will be summoned by persons appointed by the court for that particular purpose, called elisors, to whose array no challenge is allowed (Co. Litt. 158). A party may challenge to the polls after a challenge to the array has been decided against him.

Challenges to the polls, if to the favour, are thus tried:— If two jurors have been already sworn, they shall try the challenge; if not, the court appoint two indifferent persons to try it, and who are thence named triers. If the triers try one juror, and he be found indifferent, he shall be sworn; and then he and the two triers shall try the next. When another is found indifferent, the two triers shall be superseded, and the first two so sworn on the jury shall try the next (Co. Litt. 158). The following oath is previously administered to those who try the challenge:—“*You shall well and truly try whether J. S. [the juror challenged] stands indifferent between the parties to this issue: so help you God*” (Anon., 1 Salk. 152). On this the challenge, whether the cause is sufficient or not, is left to the conscience and discretion of the triers after hearing the evidence. But where the challenge to the polls is a principal challenge, it may be tried by the court without the aid or intervention of triers; and in this case the only question is whether the cause of challenge is proved. The juror himself may be examined as to the matter of challenge, provided it do not tend to his dishonour or discredit (Co. Litt. 158). If the juror be found indifferent, he is sworn on the jury; if otherwise, he leaves the jury box.

Tales.

If a sufficient number of jurors do not appear, or if, after challenge, a sufficient number do not remain to make a jury, then, upon the request of the plaintiff or defendant, the court may command the sheriff to name and appoint so many of such other able men of the same county, then present, as will make up a full jury; and the sheriff shall thereupon return such men, duly qualified, as shall be present or can be found to serve on such jury. But if neither of the parties pray a tales, the cause goes off for want of jurors. A tales,

however, is seldom necessary, except in special jury causes; Ch. XXI. and then the number of jurors wanted must be made up by drawing the names of common jurors out of the box, if a sufficient number of common jurors can be found; if not, the tales, if prayed, must be made up in the manner above directed (6 G. 4, c. 50, s. 37).

If, when an action is called on for trial, the plaintiff appears, and the defendant does not, the former may prove his claim, so far as the burden of proof lies upon him (O. 36, r. 18). If, at such time, the defendant appears, and the plaintiff does not, the defendant, if he has no counter-claim, is entitled to judgment dismissing the action, but if he has a counter-claim, then he may prove such claim so far as the burden of proof lies upon him (*Lane v. Eve*, Bitt. 136; O. 36, r. 19). Any verdict or judgment obtained where one party does not appear at the trial, may be set aside by the court or a judge upon such terms as may seem fit, upon an application made within six days after the trial; such application may be made either at the assizes or in Middlesex (O. 36, r. 20).

When both parties appear at the trial, the junior counsel for the plaintiff commences by stating what the pleadings are, and the leading counsel for the party who has the right to begin opens the case, and states the facts upon which he relies. As a general rule, the party entitled to begin is he who asserts the affirmative, and who would have a verdict against him if no evidence were given. In cases for the recovery by the plaintiff of unascertained damages the plaintiff is entitled to begin, though the affirmative of the issue may in form be with the defendant. After the opening speech, evidence is given by the party beginning, and if his opponent does not give evidence, the counsel for the party beginning then sums up the evidence, and then the counsel for the opposite party addresses the jury. But if the latter party adduces evidence, his counsel at the close of the case of the party beginning, makes his speech, then gives his evidence, and then sums up the same; the counsel of the party beginning having the right to reply (C. L. P. Act, 1854, s. 18). The judge then sums up, and the jury return their verdict.

In the absence of any agreement (a) between the parties, and subject to the rules, the witnesses at the trial, or at any assessment of damages, are examined *viva voce* and in open court (O. 37, r. 1). We have already noticed *ante*, pp. 108, 120, when affidavits may be read at the trial, and the provisions as to examining witnesses before trial, and as to their

(a) *New Westminster, &c., Co. v. Hannah*, L. R. 1 Ch. 278.

**PART V.** examinations being read in evidence on the trial. The rules of evidence are not affected by the Judicature Acts (J. A. 1875, s. 20 ; J. A. 1873, s. 72). As to an affidavit of a signature to an admission being made in pursuance of notice to admit being evidence of such admission, see O. 32, r. 4, *ante*, p. 120.

Com-  
petency of  
witnesses,  
swearing  
and cross-  
examining  
same, &c.

It is as well here to make some remarks respecting the competency of witnesses, and to refer to some of the recent enactments as to swearing and cross-examining them, &c. Persons interested in the result of an action, and persons convicted of any offence are now competent witnesses. Parties to an action, and the persons on whose behalf it is brought or defended, are admissible as witnesses. The husbands and wives of a party to the suit are also competent witnesses (6 & 7 Vict. c. 85 ; 14 & 15 Vict. c. 99 ; 16 & 17 Vict. c. 83 ; 32 & 33 Vict. c. 68, s. 1). But by 16 & 17 Vict. c. 83, s. 3, no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during marriage. By 32 & 33 Vict. c. 68, s. 2, "the parties to any action for breach of promise of marriage shall be competent to give evidence in such action: Provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise. By s. 3, the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

By the C. L. P. Act, 1854, s. 20, "if any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge, or other presiding officer, or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following, *videlicet*,

"I, *A.B.*, do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my re-

ligious belief, unlawful ; and I do also solemnly, sincerely, Gz. XXI. and truly affirm and declare," &c.

"Which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form." By s. 21, a person wilfully making a false affirmation incurs the same penalties as if he had committed perjury.

By 32 & 33 Vict. c. 68, s. 4, "if any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration :

"I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth.

And any person who, having made such promise and declaration, shall wilfully and corruptly give false evidence, shall be liable to be indicted, tried, and convicted for perjury as if he had taken an oath."

By C. L. P. Act, 1854, s. 22, "a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character ; but he may, in case the witness shall in the opinion of the judge prove adverse (a), contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent (b) with his present testimony ; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

By s. 23, "if a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the cause, and inconsistent with his present testimony does not distinctly admit that he has made such statement, proof may be given that he did in fact make it ; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular

(a) A witness is not "adverse" within the meaning of this section, merely because his testimony is unfavourable to the party calling him. To be "adverse," so as to entitle the party calling the witness to prove that he has made at another time a statement inconsistent with his present testimony, he must in the opinion of the judge be "hostile." *Greenough v. Eccles*, 28 L. J. C. P. 160, 5 C. B. N. S. 7-16.

(b) *Jackson v. Thomason*, 31 L. J. Q. B. 11, 1 B. & S. 745 ; *Ryberg v. Ryberg*, 32 L. J. Mat. Ca. 112.

**PART V.** occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

By s. 24, "a witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit."

By s. 25, "a witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanour (a), and, upon being so questioned, if he either denies the fact, or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer, (for which certificate a fee of five shillings and no more shall be demanded or taken,) shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same" (b).

By s. 27, "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

Incidental  
proceed-  
ings.

There are certain incidental proceedings which occasionally take place in the course of a trial, which may here be noticed. Sometimes, by reason of the absence of a witness or the like, it is necessary to adjourn the trial. By O. 36, r. 21, the judge has power to postpone or adjourn the trial

(a) *Henman v. Lester*, 31 L. J. C. P. 366.

(b) Before this enactment, if a witness was examined as to an offence imputed to him, and denied it, such denial was conclusive, and witnesses could not be called to contradict him (*R. v. Watson*, 2 Stark. 149).



for such time, and upon such terms, if any, as he may Ch. XXI. think fit.

It may at the trial become necessary to amend a pleading by reason of there being a variance between it and the evidence, or for some other reason. The judge at the trial has power to make such amendments in the pleadings as may be necessary for the purpose of determining the real question in controversy between the parties, or, in fact, almost any other amendment. The amendment will be allowed upon such terms as to costs, or otherwise, as may seem just (O. 27, rr. 1 & 6, *ante*, p. 89). The judge at the trial has also power in certain cases to amend by striking out or adding plaintiffs or defendants in case of misjoinder or non-joinder (see O. 16, rr. 13 & 14, *ante*, p. 43).

By C. L. P. Act, 1854, ss. 28, 29, and 31, documents not properly stamped, except those which cannot by law be stamped after the execution thereof upon payment of the duty and a penalty, may be read in evidence on the trial of a cause, upon payment, to the officer of the court who has to read the document at the trial, of the proper amount of duties and penalties. A new trial cannot be granted on the ground that the judge has improperly ruled that the stamp upon a document is sufficient, or that it did not require a stamp.

The parties, while the trial is going on, may, if they think proper, agree to settle the action without taking the verdict of the jury, and, in this case, the parties sometimes agree to withdraw a juror. The withdrawal of a juror puts an end to the action, and the court or judge will stay any proceedings afterwards taken in it.

The judge at the trial has power to refer questions arising in an action which cannot be conveniently tried before the jury, such as questions involving a prolonged examination of accounts. This power to refer is treated of at length in chaps. 36, 37. Some of the questions between the parties may be fit for trial by the jury, and others not. In such a case the judge would only order the latter to be referred, and try the former.

If upon the trial, as is sometimes the case, it turns out that the questions in dispute are really matters of law, the parties may agree that a special case be stated, leaving the questions for the opinion of the court, or in some cases the judge at the trial, without the consent of the parties, may order a special case to be stated. As to this, see O. 34, rr. 1 & 2, *ante*, p. 105.

Before the Judicature Acts the plaintiff, when in the course

**PART V.** of the trial he perceived that the case was going against him, frequently elected, as he might do, to be nonsuited, *i.e.*, he declined further to prosecute his suit. In practice, when the plaintiff so elected, he was called in court, and not answering when so called, he was nonsuited. Upon judgment of nonsuit, the plaintiff was, and still is, liable to pay the defendant's costs. But there was this advantage he obtained, he could bring another action for the same cause as that for which he had brought the action in which he had been nonsuited, which he could not do if there had been a verdict for the defendant. A verdict for the defendant would have estopped him from bringing another action for the same cause, but a nonsuit did not. A plaintiff may still be nonsuited, but in general there is now no difference in the effect between a verdict for the defendant and a nonsuit, as by O. 41, r. 6, a judgment of nonsuit, unless the court or a judge otherwise directs, has the same effect as a judgment upon the merits for the defendant.

A bill of exceptions, as noticed chap. 27, was formerly tendered where a judge at the trial misdirected the jury or improperly admitted or rejected evidence. This mode of proceeding is abolished by the Judicature Acts (O. 58, r. 1): but an exception may be entered on or annexed to the record for the purpose of enforcing the right to have the issues for trial by jury properly submitted and left to them by the judge, as mentioned *infra*.

A jury may be discharged by the judge. This is done when they cannot agree upon their verdict, or where one of them is taken ill, or the like.

Summing  
up by  
judge—  
verdict.

Upon the conclusion of the speech of the counsel who has the right to reply, or have the last word, the judge sums up the case to the jury, explains the law of the case where necessary, and leaves to them the question or questions of fact which they have to decide. Nothing in the Judicature Acts takes away or prejudices the right of any party to have the issues for trial by jury submitted and left by the judge to the jury, with a proper and complete direction upon the law, and as to the evidence applicable to such issues. This right may be enforced either by motion in court or in the Court of Appeal founded upon an exception entered upon or annexed to the record (J. A. 1875, s. 22). The jury, when they are agreed, find a verdict (*a*) on the questions submitted to them. If the jury cannot

(a) Before the Judicature Acts the jury found sometimes what was called a special verdict, *i.e.*, they found the facts, leaving it to the Court

agree upon their verdict, they may be discharged. Where there are several distinct issues to be tried in one action, it is competent to the judge, in his discretion, and without the consent of the parties, to accept the verdict of the jury upon those issues on which they are able to agree, and discharge them upon the others, without invalidating the trial, and judgment may be given on the matters decided. The court may, if necessary, send down the undecided issues for a new trial (*Marsh v. Isaacs*, 45 L. J. C. P. 505). CH. XXI.

By r. 3, 7th Nov. 1876, the judge may thereupon at or after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration (a), or leave any party to move for judgment. No judgment can be entered after a trial without the order of a court or judge. Upon every trial at the assizes, or at the London and Middlesex sitting of the Queen's Bench, Common Pleas, or Exchequer Division, where the officer present at the trial is not the officer by whom judgments ought to be entered, the associate must enter all such findings of fact as the judge may direct to be entered, and the directions, if any, of the judge as to judgment, and the certificates, if any, granted by the judge, in a book to be kept for the purpose (O. 36, r. 23). If the judge direct that any judgment be entered for any party absolutely, the certificate of the associate to that effect is a sufficient authority to the proper officer to enter judgment accordingly. The certificate may be in the Form No. 15 in Appendix (B.) (O. 36, rr. 24, 25). Ordering judgment to be entered.

In some cases it is necessary or advisable to apply to the judge at the trial after the verdict for an order or certificate respecting the costs of the action. As to this, see *post*, chap. 25. If a cause has been tried by a special jury and the party who obtained the order for such jury succeeds, he should *immediately* after the trial apply to the judge who tried the action for a certificate that the cause was one fit to be tried by a special jury, otherwise he will not obtain the costs of it (6 G. 4, c. 50, s. 30). Where the unsuccessful party is desirous of moving for a new trial, it may sometimes be necessary for him to apply to the judge to extend the time for moving (O. 39, r. 1, chap. 23).

to determine what judgment should be pronounced. By reason of the alterations made in the mode of procedure by the above Acts, a special verdict will seldom now be found.

(a) See Judicature Act, 1873, s. 46; Judicature Act, 1876, s. 17, *ante*, p. 14.

PART V.*(b.) Trials by a Judge alone and with Assessors.*

Many of the remarks made with respect to the trial by judge (a) and jury apply here, and some, it is obvious, do not apply.

By Judicature Act, 1873, s. 56, the High Court or Court of Appeal may in any cause or matter (other than a criminal proceeding by the crown) in which it may think it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors. The remuneration (if any) to be paid to such assessors is to be determined by the court (see *Sugg v. Silber, ante*, p. 117).

Trials with assessors take place in such manner and upon such terms as the court or a judge may direct (O. 36, r. 28 ; see O. 36, r. 27, *ante*, p. 118).

(a) See Common Law Procedure Act, 1854, s. 1.

## CHAPTER XXII.

MOTION FOR JUDGMENT OR TO SET ASIDE JUDGMENT  
ENTERED AT THE TRIAL.

EXCEPT where by the Acts or Rules otherwise provided, the judgment of the court must be obtained by motion for judgment (*a*) (O. 40, r. 1). No action can, except by leave of the court or a judge, be set down on motion for judgment after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do (O. 40, r. 9). A motion for judgment is usually heard and determined before the judge who tried the cause, though it may sometimes be heard by another judge or a Divisional Court (*ante*, p. 14, Judicature Act, 1873, s. 46.) When the motion is to be heard before a single judge, he usually appoints some day for hearing it. Upon a motion for judgment, or for a new trial, the court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit (O. 40, r. 10).

In some cases the judge at the trial, as mentioned *ante*, p. 141, leaves a party to move for judgment. Where at the trial of an action the judge or referee abstains from directing any judgment to be entered, the plaintiff may set down the action on motion for judgment. If he does not so set it down and give notice thereof to the other parties within ten days after the trial, any defendant may do so, and give notice thereof to the other parties (O. 40, r. 3). This rule does not apply where a verdict of the jury is taken at the trial subject to a reference (*Lloyd v. Lewis*, 46 L. J. Q. B. 81).

(*a*) This rule does not apply when the action has been sent down for trial at a County Court, see *ante*, p. 113.

PART V.

By R. 7, 7th Nov. 1876, where at or after the trial of an action by a jury the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them. Where at or after the trial of an action before a judge, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong. An application under this rule must be to the Court of Appeal.

Sometimes a referee at the trial of an action will order judgment to be entered, but give the party against whom judgment is entered leave to move to set the same aside and enter some other judgment in lieu thereof. In such a case the party to whom leave has been reserved must set down the action on motion for judgment, and give notice thereof to the other parties within the time limited by the referee in reserving leave, or if no time has been limited, within ten days after the trial. The notice of motion must state the grounds of the motion, and the relief sought, and that the motion is pursuant to leave reserved (O. 40, r. 2). Where at the trial of an action before a referee, he has directed that any judgment be entered, any party may, without any leave reserved, move to set aside such judgment, and to enter any other judgment, on the ground that upon the finding as entered the judgment so directed is wrong (O. 40, r. 5). If upon such a motion it is necessary to refer to the referee's notes, they must be verified by affidavit (*Stubble v. Boyle*, 46 L. J. C. P. 136).

Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, the plaintiff may set down the action on motion for judgment as soon as such issues or questions have been determined. If he does not so set it down, and give notice thereof to the other parties within ten days after his right so to do has arisen, then after the expiration of such ten days any defendant may set down the action on motion for judgment, and give notice thereof to the other parties (O. 40, r. 7).

By O. 40, r. 8, where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and some only of such issues or questions of fact

have been tried or determined, any party who considers that CH. XXII.  
 the result of such trial or determination renders the trial or  
 determination of the others of them unnecessary, or renders  
 it desirable that the trial or determination thereof should  
 be postponed, may apply to the court or a judge for leave to  
 set down the action on motion for judgment, without  
 waiting for such trial or determination. And the court or  
 judge may, if satisfied of the expediency thereof, give such  
 leave, upon such terms, if any, as shall appear just, and may  
 give any directions which may appear desirable as to post-  
 poning the trial of the other questions of fact.

By O. 40, r. 11, any party to an action may at any stage  
 thereof apply to the court or a judge for such (a) order as  
 he may, upon any admissions (b) of fact in the pleadings, be  
 entitled to, without waiting for the determination of any  
 other question between the parties (*Aitken v. Dunbar*, 46 L. J.  
 Ch. 489). The foregoing rules of this order do not apply to  
 such applications. The court or a judge may (*Mellor v.*  
*Sidebottom*, 46 L. J. Ch. 398), on any such application, give  
 the relief claimed and subject to terms. A motion cannot  
 be made by the defendant under this rule to dismiss the  
 action upon the ground that the plaintiff's admissions es-  
 tablish the defence (*Linton v. Linton*, 46 L. J. Ch. 64 ; L. R.  
 3 Ch. 793).

(a) *Gilbert v. Smith*, 45 L. J. Ch. 514, L. R. 2 Ch. 686 ; *Rumsey v.*  
*Reade*, 45 L. J. Ch. 489, L. R. 1 Ch. 463 ; *Bennett v. Moore*, 45 L. J.  
 Ch. 275, L. R. 1 Ch. 692 ; *Tarquand v. Wilson*, 45 L. J. Ch. 104, L. R.  
 1 Ch. 85.

(b) *Martin v. Gale*, 46 L. J. Ch. 84. See *Thorp v. Holdsworth*, 45  
 L. J. Ch. 406, *ante*, p. 77, where the denial of a fact was evasive.

## CHAPTER XXIII.

## MOTION FOR A NEW TRIAL, ETC.

PART V. A TRIAL *de novo*, called, before the Common Law Procedure Act, 1852, a *venire de novo*, was, before the Judicature Acts, awarded for some defective finding of the jury appearing upon the face of the record ; while a new trial was and is granted for matter entirely extrinsic. Thus, if in an action for damages the jury found for the plaintiff but omitted to assess the damages, a trial *de novo* might be awarded, where the defect could not be supplied by a writ of inquiry.

Since the Judicature Acts, a trial *de novo* will seldom be necessary on account of the powers given to the High Court and the Court of Appeal (see O. 39, rr. 3, 4, *infra* ; O. 40, r. 10, *ante*, p. 143 ; O. 58, r. 5, *post*, Ch. 27).

Grounds for moving for a new trial. A party dissatisfied with the verdict of the jury may in certain cases move for a new trial.

One ground of moving for a new trial is that the verdict was against the evidence. In general a new trial will not be granted on this ground where the question was a doubtful one, and was essentially a question for the jury ; nor will it be granted on this ground where no right or title is in question, and the damages were less than £20, or where the matter in dispute was less than that sum. If there was no evidence to support the verdict a new trial will be granted.

If the damages given by the jury are excessive or not enough, a new trial may be granted. But it must be remembered that in some cases, such as slander, libel, and the like, the question of damages is one peculiarly for the jury, and in these cases the court will not interfere with the verdict of the jury unless in a very clear case.

If the judge who tried the cause misdirected the jury on a matter of law or improperly received or rejected evidence, a new trial in some cases will be granted. By O. 39, r. 3, a new trial shall not be granted on either of these grounds, unless in the opinion of the court to which the application is made some substantial wrong or miscarriage has been



thereby occasioned in the trial of the action; and if it appear to such court that such wrong or miscarriage affects part only of the matter in controversy, the court may give final judgment as to part thereof, and direct a new trial as to the other part only. CH. XXIII.

A new trial may also be granted in some cases where a party has been taken by surprise by evidence given at the trial, or upon the ground that no notice of trial was given, or for misbehaviour of the jury, and in some other cases where justice requires it. In what court and when motion to be made.

A new trial may be granted where the trial was by a judge without a jury, but in such a case the application for the new trial must be made to the Court of Appeal (r. 5, 7 Nov. 1876).

Where, in an action in the Queen's Bench, Common Pleas, or Exchequer Division there has been a trial by jury the application for a new trial must be made to a divisional court (r. 5, 7 Nov. 1876; J. A. 1876, s. 17).

By r. 6, 7th Nov. 1876, applications for new trials shall be by motion calling on the opposite party to show cause at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made within the times following, unless the court or a judge shall enlarge the time. An application to a Divisional Court for a new trial, if the trial has taken place in London or Westminster, shall be made within four days after the trial, or on the first subsequent day on which a Divisional Court to which the application may be made shall have actually sat to hear motions. If the trial has taken place elsewhere than in London or Middlesex, the motion shall be made within the first four days of the next following sittings.

A copy of such order nisi must be served on the opposite party within four days from the time of the same being made (O. 39, r. 2). The order is a stay of proceedings in the action, unless the court order that it shall not be so as to the whole or any part of the action (O. 39, r. 5). In an action for negligence against two defendants, where, assuming there was negligence, if one defendant was not liable the other was, a verdict was found in favour of one defendant and against the other; it was held that the latter defendant could not move for a new trial without calling on the other defendant to show cause why there should not be a new trial (*Purnall v. G. W. R. Co. and Harris*, 45 L. J. Q. B. 687).

By O. 39, r. 4, a new trial may be ordered on any ques-

PART V. tion in an action, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question (*Marsh v. Isaacs*, 45 L. J. C. P. 505). As to the judgment the court may give on the motion for a new trial, and as to directing further issues, &c., to be tried when necessary, see O. 40. r. 10, noticed *ante*, p. 143.

As to appealing against the refusal of or an order for a new trial, see chap. 27.

Motion for judgment *non obstante veredicto*.  
—for arrest of judgment.  
—for a repleader.

Before the Judicature Acts, a motion for judgment *non obstante veredicto* was sometimes made by the plaintiff. A plaintiff was entitled to this judgment where the defendant obtained a verdict upon a plea which confessed the cause of action and professed to avoid it by matter which upon the face of the record was no answer to it. In some cases also, before the Judicature Acts, a motion might be made in arrest of judgment. The court would arrest the judgment for any matter appearing upon the face of the record not amendable, or aided at common law or by statute and for which error would lie: for instance, if the plaintiff's declaration in the action disclosed no cause of action, the judgment might be arrested though the verdict and judgment was in his favour. In order to discourage these motions, by the C. L. P. Act, 1852, ss. 143, 144, 145, the court might allow suggestions to be entered for the purpose of curing the defect objected to in the pleading, which suggestion might be pleaded to, and any issues raised might be tried as in an ordinary action. If the party making the suggestion succeeded he was entitled to the same judgment as if the facts suggested had been originally stated, and proved or admitted on the trial, and also to the costs of the proceedings on the suggestion; and if he failed he had to pay the costs of the proceedings on the suggestion. S. 145 contained a provision as to the costs of the issues arising out of the defective pleadings. Also, before the Judicature Acts, if the issue or issues raised by the pleadings were immaterial, or there had been no definite issue joined, the court in some cases would after trial award a *repleader* if it would be the means of effecting substantial justice between the parties. Where a repleader was awarded the parties began pleading again at the first fault which occasioned the immaterial issue: thus if the replication only were bad, they would begin at the replication. Under the present practice it is presumed that these motions for judgment *non obstante veredicto*, in arrest of judgment, and for a repleader will not be made, but instead thereof proceedings will be taken as mentioned in chap. 22, or by appeal.

## PART VI.

## JUDGMENT, COSTS, AND EXECUTION.



## CHAPTER XXIV.

## FINAL JUDGMENT.

THE judgment is the sentence of the law pronounced by the court. Interlocutory judgments are treated of in chap. 16. In this chapter final judgments are considered. The forms of judgments will be found in Appendix D. which may be used with such variations as circumstances may require (O. 41, r. 1).

Every judgment must be entered by the proper officer in Entry of the book to be kept for the purpose. The party entering judgment. the judgment must deliver to the officer a copy of the whole of the pleadings in the action other than any petition or summons; such copy must be in print, except such parts (if any) of the pleadings as are by the rules permitted to be written. No copy need be delivered of any pleading a copy of which has been delivered on entering any previous judgment in such action (O. 41, r. 1).

By O. 41, r. 2, where any judgment is pronounced by the court or a judge in court, the entry of the same must be dated as of the day on which it is pronounced, and the judgment takes effect from that date. By O. 41, r. 3, in all cases not within the last preceding rule, the entry of judgment must be dated as of the day on which the requisite documents are left with the proper officer for the purpose of such entry, and the judgment takes effect from that date.

Where it is provided that any judgment may be entered (a) or signed upon the filing of any affidavit or production of any document, the officer must examine the affidavit or

(a) As to the certificate of the associate being a sufficient authority to enter judgment, see O. 36, r. 24, *ante*, p. 141.

**PART VI.** document produced, and if the same be regular and contain all that is by law required he must enter judgment accordingly (O. 41, r. 4).

Where any judgment may be entered pursuant to any order or certificate, or return to any writ, the production of such order or certificate sealed with the seal of the court, or of such return, is a sufficient authority to the officer to enter judgment accordingly (O. 41, r. 5).

Effect of  
judgment  
of nonsuit.

Before the Judicature Acts after a nonsuit, which was only a default, a plaintiff might commence another action against the defendant for the same cause of action, but after a judgment for the defendant on the merits the plaintiff was for ever barred from suing the defendant upon the same ground of complaint. By O. 41, r. 6, a judgment of nonsuit, unless the court or a judge otherwise directs, has the same effect as a judgment upon the merits for the defendant, but in any case of mistake, surprise, or accident, any judgment of nonsuit may be set aside on such terms, as to payment of costs and otherwise, as to the court or a judge shall seem just (*ante*, p. 140).

Judgment  
against an  
executor,  
&c.

Before the Judicature Acts the final judgment against an executor or administrator, sued as such for a debt or damages, after a verdict against him (except when he pleaded certain pleas false to his own knowledge, as a plea of *ne unques* executor or administrator, or release to himself), was that the debt and costs or damages and costs be levied of the goods and chattels of the testator in the hands of the defendant if he had so much thereof in his hands to be administered, and if not then the costs to be levied of his own goods. But if the defendant, sued as executor or administrator, pleaded either of the above pleas, and it was found against him, the judgment was *de bonis testatoris, si, &c., et si non, &c., de bonis propriis*, or perhaps unconditionally *de bonis propriis*. There was not much difference between these judgments; for if the sheriff returned, as he might do, not only *nulla bona* but also a *devastavit* to a *fi. fa. de bonis testatoris*, the plaintiff might sue out an execution immediately against the defendant personally. It seems the sheriff ran no great risk by returning a *devastavit*, for the judgment and the fact of no assets being found was sufficient evidence of a *devastavit* in an action against him for a false return. If the sheriff did not return a *devastavit*, the remedy to get execution against the defendant personally was by a *scire fieri* inquiry, or, which was more usual, by an action on the judgment suggesting a *devastavit*. As to the mode of proceeding in these cases, see Wms. on Exors, 7th ed. p. 1983. Perhaps since

the Judicature Acts where it is admitted by the pleadings CH. XXIV.  
that the defendant sued as executor or administrator as above  
has assets to meet the plaintiff's claim, and the plaintiff gets a  
verdict, he will have judgment in the ordinary form against  
the defendant, which may be enforced against him per-  
sonally.

As to registering judgments entered up before the 29th day of July, 1864, in order that the same may affect lands, &c., as against purchasers, &c., see 1 & 2 Vict. c. 110, s. 12; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 & 19 Vict. c. 15. Registra-  
tion of  
judgments.  
As to judgments entered up after the above date not affecting land until it has been delivered in execution, see *post*, ch. 26.  
As to registering judgments as against heirs and executors, see 23 & 24 Vict. c. 38, ss. 3, 4, 5. As to entering satisfaction, or discharge of a registered judgment, see 23 & 24 Vict. c. 115, s. 2.

## CHAPTER XXV.

## Costs.

## PART VI.

Rule  
respecting.

ORDER 55 of the Judicature Act, 1875, has made a great alteration in the law of costs. By this order, "subject to the provisions of the Act, the costs of and incident to all (a) proceedings in the High Court shall be in the discretion of the court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in courts of equity: Provided, that where any action or issue is tried by a jury, the costs shall follow the event (b), unless upon application made at the trial for good cause shown the judge before whom such action or issue is tried or the court (c) shall otherwise order."

It is very doubtful what is the meaning of that part of this order, which provides that the costs shall abide the event when there is no order to the contrary. It might mean that the party obtaining the verdict should in all cases be entitled to costs unless an order to the contrary be made; or, it might mean that such party should be entitled to costs unless deprived of them by some statute in existence at the time of the commencement of the Judicature Acts. The Court of Appeal has decided that the latter is the meaning of the order. Accordingly, where, since the Judicature Act, in an action of slander, the plaintiff recovered one farthing damages and no order as to costs was made, such court held that the 21 J. 1, c. 16, s. 6, noticed *infra*,

(a) See *Abud v. Riches*, 45 L. J. Ch. 649, as to costs in clearing a contempt of court after an attachment has issued for same.

(b) Where a nonsuit had been set aside and a new trial granted, and on the second trial judgment had been given for the plaintiff; it was held that the costs of the first trial were included in the costs which must "follow the event" of the second trial (*Green v. Wright*, 46 L. J. C. P. 427).

(c) If no application be made at the trial, the application cannot be made at Chambers, but only to a Divisional Court: *Baker v. Oakes*, 46 L. J. Q. B. 246.

applied, and that the plaintiff could not recover more costs than damages (*Garnett v. Bradley*, 46 L. J. Ex. 545). It is therefore necessary to refer to the statutes in existence at the time the Judicature Acts came into operation, which affected a party's right to costs when he obtained a verdict; and these statutes will still apply where the action is tried by a jury, and no order has been made by the judge or the court respecting the costs. CH. XXV.

By 43 Eliz. c. 6, s. 2, in all personal actions except actions of trespass and trespass on the case (3 & 4 Vict. c. 24, s. 1), if the plaintiff recovers less than 40s., and the judge who tries the cause certify that the damages amount to less than 40s., the plaintiff recovers no more costs than damages, unless the action be for title or some interest in land, or concerns the freehold or inheritance of land. Former statutes depriving a party of costs in certain cases.

The 21 Jac. 1, c. 16, s. 6, enacts, that in all actions upon the case for slanderous words, if the jury upon the trial of the issue, or upon an inquiry of damages find or assess the damages under 40s., the plaintiff shall recover only so much costs as the damages amount to. But this enactment extends only to such words as are actionable of themselves. It does not, therefore, extend to actions for slander of title, or to other actions where the special damages are the very gist of the action. It extends to words actionable only in respect of their being spoken of the plaintiff in his trade, or the like, even though the defendant pleads a justification, and to writs of inquiry; but not where the case is referred by consent before trial.

By 3 & 4 Vict. c. 24, s. 2, if the plaintiff in any action of trespass or of trespass on the case recovers by the verdict of a jury less damages than 40s., he is not entitled to recover from the defendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom the verdict is obtained immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action was brought, or that the trespass or grievance was wilful and malicious.

The third section of the act provides, that nothing therein contained shall deprive the plaintiff of costs in any action brought for a trespass over any lands, dwellings, &c., in respect of which any notice by or on behalf of the owner or occupier of the land, &c., trespassed over, not to

**PART VI.** trespass thereon has been previously served on the defendant or defendants, or left at his or their last reputed or known place of abode.

This statute does not apply to judgment on demurrer or an inquiry consequent upon it. It applies if a verdict be taken by consent subject to the certificate of an arbitrator. The certificate referred to in the statute may be granted within a reasonable time after the trial or inquiry.

By 30 & 31 Vict. c. 142, s. 5, if in any action commenced after the passing of this Act in any of Her Majesty's Courts of Record, the plaintiff shall recover a sum not exceeding £20, if the action is founded on contract, or £10 if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at chambers shall by rule or order allow such costs. By the Judicature Act, 1873, s. 67, the provisions contained in this section apply to all actions commenced or pending in the High Court of Justice, *in which any relief is sought which can be given in a County Court*. Before the Judicature Acts, it was held that this enactment applied to all actions, whether they could be brought in a County Court or not (*Sampson v. Mackay*, 38 L. J. Q. B. 245) ; and perhaps this is so now.

The law, therefore, at the time of the commencement of the Judicature Acts, as to verdicts for less damages than 40s. (independently of the 30 & 31 Vict. c. 142, s. 5), stood thus: In actions on the case for slanderous words actionable in themselves, if the plaintiff recovered less than 40s., he, unless the judge certified under the 3 & 4 Vict. c. 24, s. 2, got no costs ; and, if the judge did so certify, then the plaintiff only recovered as much costs as damages. In other actions on the case, and in actions of trespass, without reference to the 30 & 31 Vict. c. 142, s. 5, if the plaintiff recovered less than 40s. he had no costs whatever, unless the judge certified that the action was brought to try a right besides the mere right to recover damages, or that the trespass was wilful and malicious, or unless it was suggested on the roll that the action was for a trespass to lands, &c., after notice. In other personal actions, if the plaintiff recovered less than 40s., he was, so far as regards the above statutes, and without reference to the 30 & 31 Vict. c. 142, entitled to his full costs, unless the judge who tried the cause certified to deprive him of them.

There are some cases in which the legislature, for the



protection of persons occupying particular public situations, CH. XXV. has taken away the plaintiff's right to costs under certain circumstances; for instance, in an action against a justice of the peace for anything done by him under a conviction which has been quashed, the plaintiff is, by statute 11 & 12 Vict. c. 44, s. 13, to have no costs, if it be proved that he was actually guilty of the offence for which he was convicted, or liable by law to pay the sum he was ordered to pay, and with respect to any imprisonment under the conviction that he has undergone no greater punishment than that assigned by the law for the offence of which he was convicted, or for non-payment of the sum he was ordered to pay.

By r. 28, T. T., 1853, a person admitted to sue in *formâ pauperis* shall not in any case be entitled to costs from the opposite party, unless by order of the court or a judge. A plaintiff suing in *formâ pauperis*, who recovers a verdict exceeding £5, and obtains an order for his costs, is only entitled to recover from the defendant such costs as he has paid or is liable to pay; he cannot be allowed in taxation any fees to counsel or attorney, as he is not liable to pay the same by the 11 Hen. 7, c. 12, and r. 121, H. T. 1853 (*Dewley v. Great Northern Rail. Co.*, 24 L. J. Q. B. 25).

In actions upon *judgments*, the 43 G. 3, c. 46, s. 4, prevents the plaintiff from obtaining costs, unless the court or a judge expressly order them. This enactment applies only to an action on a judgment alone, and not to an action on a judgment, and also on a distinct cause of action; and in the latter case, if a plaintiff succeed on both causes of action, he is entitled to the whole costs of suit, without any order (*Jackson v. Everett*, 31 L. J. Q. B. 59; 1 B. & S. 857). It was passed in order to deter plaintiffs from accumulating expenses by bringing actions upon judgments instead of issuing execution on them, and does not extend to cases where the defendant sues upon a judgment in his favour. By s. 6 of 31 & 32 Vict. c. 54 (the Act for rendering judgments obtained in certain courts in England, Scotland, and Ireland, respectively effectual in any other part of the United Kingdom), in any action brought on any such judgment the plaintiff shall not recover costs unless the court in which the action is brought, or some judge thereof, shall otherwise order.

The 15 & 16 Vict. c. 83, contains an enactment as to costs in actions for infringing letters patent.

By 3 & 4 W. 4, c. 42, s. 32, if one of several defendants in a personal action obtain a verdict, he is entitled to recover

**PART VI.** his costs, unless the judge before whom the cause is tried certify upon the record, under his hand, that there was a reasonable cause for making him a defendant.

By 3 & 4 W. 4, c. 42, s. 31, an executor or administrator in an action brought in right of the testator or intestate is made liable to costs like other persons, unless the court or a judge otherwise order. An executor or administrator sued as such is liable to costs *de bonis propriis* on a judgment by default. When he is so liable after verdict, see *ante*, p. 150. When the defendant pleads *plene administravit*, or judgments outstanding, and *plene administravit præter*, and the plaintiff, admitting the truth of the plea, takes judgment of assets *in futuro*, the defendant is not liable to costs. Nor does he become liable thereto when he pleads *plene administravit præter*, and the plaintiff admitting the truth of the plea, takes judgment of the assets admitted in part, and for the residue of assets *in futuro*. In these cases the plaintiff is allowed his costs out of the future assets, and judgment may be entered for them accordingly (*ante*, p. 92).

Order  
depriving  
party of  
costs or  
giving  
same.

Where the verdict of the jury is in the plaintiff's favour, and, if not otherwise ordered, he would get his costs, the judge at the trial or the court may make an order, under the latter part of O. 55, depriving the plaintiff of his costs where the action is a frivolous one, or there was no necessity for bringing it. So, if a defendant obtains a verdict, an order may in some cases be made depriving him of costs. The judge also at the trial, or the court, will, when necessary and proper, grant a certificate or order in the manner and under the circumstances mentioned in the above statutes, for the purpose of depriving of, or giving, the party obtaining the verdict of the jury, his costs. And, it should be mentioned, that no order made by the High Court of Justice, or any judge thereof, as to costs only, which by law are left to the discretion of the court, is subject to any appeal, except by leave of the court or judge making such order (J. A. 1873, s. 49).

Double  
and treble  
costs.

Before the 5 & 6 Vict. c. 97, there were some Acts of Parliament which gave double and treble costs. But by sect. 1 of this Act, so much of any enactment, in any Act, commonly called public, local and personal, or local and personal, or in any Act of a local and personal nature, whereby it is enacted that either double or treble costs, or any other than the usual costs, between party and party, may be recovered, is repealed; and in lieu thereof, the usual costs between party and party may be recovered, and no more. And by sect. 2, so much of any enactment, in any public Act,

not local or personal, whereby it is enacted that either CH. XXV. double or treble costs, or any other than the usual costs between party and party, shall be recovered, is repealed; and instead of such costs, the party or parties entitled under such last-mentioned Act to such double, treble, or other costs, shall receive such full and reasonable indemnity as to all costs, charges and expenses incurred in and about any action, suit, or other legal proceeding, as shall be taxed by the proper officer.

The costs are taxed by a master. In general it is necessary to give one day's notice of taxation to the opposite party (r. 59, H. T. 1853). Taxation of costs.

O. 6, of 12th August, 1875, contains regulations as to solicitors' costs of proceedings in the Supreme Court. The following important rules have been made as to the taxation of costs by the schedule to this Order.

By r. 8, as to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses, are to be allowed. Costs incurred in "qualifying witnesses," so as to enable them to give evidence at the trial are included in this rule (*Mackley v. Chillingworth*, 46 L. J. C. P. 484).

By rule 18 (a) the court or judge may, at the hearing of any cause or matter, or upon any application or procedure in any cause or matter in court or at chambers, and whether the same is objected to or not, direct the costs of any pleading, affidavit, evidence, notice to cross-examine witnesses, account, statement, or other proceeding, or any part thereof, which is improper, unnecessary, or contains unnecessary matter, or is of unnecessary length, to be disallowed, or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, or to contain unnecessary matter, or to be of unnecessary length; and in such case the party whose costs are so disallowed shall pay the costs occasioned to the other parties by such unnecessary proceeding, matter, or length; and in any case where such question shall not have been raised before and dealt with by the court or judge, the taxing officer may look into the same (and, as to evidence, although the same may be entered as read in any decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so.

By r. 19, in any case in which, under the preceding rule,

(a) See also O. 19, r. 2, *ante*.

PART VI. No. 18, or any other rule of court, or by the order or direction of a court or judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered.

By r. 21, where any party appears upon any application or proceeding in court or at chambers, in which he is not interested, or upon which, according to the practice of the court, he ought not to attend, he is not to be allowed any costs of such appearance unless the court or judge shall expressly direct such costs to be allowed.

By r. 23, the Taxing-officers of the Supreme Court, or of any division thereof, shall, for the purpose of any proceeding before them, have power and authority to administer oaths, and shall, in relation to the taxation of costs, perform all such duties as have heretofore been performed by any of the masters, taxing-masters, registrars, or other officers of any of the courts whose jurisdiction is by the Act transferred to the High Court of Justice or Court of Appeal, and shall, in respect thereof, have such powers and authorities, as previous to the commencement of the Act, were vested in any of such officers, including examining witnesses, directing production of books, papers, and documents, making separate certificates or allocaturs, requiring any party to be represented by a separate solicitor, and to direct and adopt all such other proceedings as could be directed and adopted by any such officer on references for the taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the court or a judge.

By r. 24, the taxing officer may direct what parties are to attend before him on the taxation of costs to be borne by a fund or estate, and disallow the costs of any party whose attendance was unnecessary in consequence of the interest of such party in such fund or estate being small or remote, or sufficiently protected by other parties interested.

By r. 25, when any party entitled to costs refuses or neglects to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party,

the taxing-officer may certify the costs of the other parties, and certify such refusal or neglect, or may allow such party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by such refusal or neglect. CH. XXV.

By r. 26, as to costs to be paid or borne by another party, no costs are to be allowed which were not necessary or proper for the attainment of justice or defending the rights of the party, or which have been incurred through over-caution, negligence, or mistake, or merely at his desire.

By r. 29, as to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing-officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances.

By r. 30, any party who may be dissatisfied with the allowance or disallowance, by the taxing-officer, in any bill of costs taxed by him, of the whole or any part of any item or items, may, at any time before the certificate or allocatur is signed, deliver to the other party interested therein, and carry in before the taxing officer an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the item or items, or parts or part thereof objected to, and may thereupon apply to the taxing officer to review the taxation in respect of the same.

By r. 31, upon such application, the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto.

By r. 32, any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to, as aforesaid, may apply to a judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order, as to him may seem just; but the certificate or allocatur of the

**PART VI.** taxing officer is final and conclusive, as to all matters not objected to in manner aforesaid (a).

By r. 33, such application is to be heard and determined by the judge upon the evidence brought in before the taxing officer, and no further evidence is to be received upon the hearing thereof, unless the judge otherwise direct.

By r. 34, all fees, allowances, rules and directions relating to costs, apply when the writ of summons is issued from, or other proceedings in the action are taken in the district registry (a).

Recovery  
of costs.

The costs of the action are awarded by the judgment in the action, and are recoverable by execution. The remedy for costs payable by rule of court or judge's order, is the same as upon a judgment.

As to the fees to be taken in the courts and offices connected with the same, and as to such fees being taken by stamps, see O. 28, Oct. 1875.

(a) As to district registries, see *post*, ch. 35.

## CHAPTER XXVI.

## EXECUTION.

EXECUTION has been called the life of the law. It is issued for the purpose of giving effect to and enforcing the judgment.

A judgment whereby a party recovers money or costs is usually enforced by a writ of *feri facias* or *elegit* (O. 42, r. 1). Such a judgment may be enforced by any of the modes by which a judgment or decree for the payment of money might have been enforced at the time of the passing of the Judicature Acts. A judgment for the payment of money into court may be enforced by writ of sequestration, or in cases in which attachment is authorised by law, by attachment (O. 42, r. 2). A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession (O. 42, r. 3). A judgment for the recovery of any property other than land or money may be enforced:—by writ for delivery of the property—by writ of attachment—and by writ of sequestration (O. 42, r. 4). A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal (O. 42, r. 5).

How judgments enforced.

Every order of the court or a judge, whether in an action, cause, or matter, may be enforced in the same manner as a judgment to the same effect (O. 42, r. 20). In cases other than those mentioned in rule 18 (a), any person, not being a party in an action, who obtains any order or in whose favour any order is made, is entitled to enforce obedience to such order by the same process as if he were a party to the action; and any person not being a party in an action, against whom obedience to any judgment or order may be enforced, is liable to the same process for enforcing obedience to such judgment or order as if he were a party to the action (O. 42, r. 21).

By O. 42, r. 6, in these rules the term "writ of execution" shall include writs of *feri facias*, *capias*, *elegit*, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party" shall mean the issuing of any such

General orders as to.

(a) See *post*, p. 163.

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process against his person or property as under the preceding rules of this Order shall be applicable to the case. By O. 42, r. 23, nothing in any of the rules of this Order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever. By O. 42, r. 24, nothing in this Order shall affect the order in which writs of execution may be issued. When the judgment is for a sum of money or costs, the judgment creditor may sue out a *fi. fa.*, or *elegit*, or *ca. sa.*, when it will lie; or after suing out one he may abandon it before it is executed and sue out another. If the debtor be taken on a *ca. sa.*, no other writ of execution can in general be issued against him on the judgment upon which the *ca. sa.* issued, unless he die in execution, or escape, or be rescued, and after lands have been extended and delivered on an *elegit*, a *fi. fa.* or *ca. sa.* against partners cannot be executed upon the same judgment as that on which the *elegit* issued.

Against  
partners.

Where a judgment is against partners in the name of the firm, execution may issue in manner following:

- (a) Against any property of the partners as such:
- (b) Against any person who has admitted on the pleadings that he is, or has been adjudged to be a partner:
- (c) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the court or a judge for leave so to do; who may give such leave if the liability be not disputed, or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined (O. 42, r. 8).

The execution against an executor or administrator, sued as such, should follow the judgment, which is as mentioned *ante*, p. 150.

Where  
judgment  
subject to  
a condi-  
tion.

Where a judgment is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the court or a judge for leave to issue execution against such party. And the court or judge may, if satisfied that the right to relief has arisen according to the terms of the judgment, order that execution issue accordingly, or may direct that any issue or question necessary for the determi-



nation of the rights of the parties be tried in any of the ways CH. XXVI.  
in which questions arising in an action may be tried (O. 42,             
r. 7).

Before the Judicature Acts, if, on a plea of *plene administravit* in an action against an executor or administrator, or on a plea of *riens per descent* in an action against an heir, the plaintiff, instead of taking issue on the plea, took judgment of assets *quando acciderint*, and assets afterwards come to the hands of the executor or heir, the plaintiff must first have sued out a *scire facias* against such executor or heir, before he could have execution. (See C. L. P. Act, 1854, s. 91.) But it seems that in such a case a *scire facias* is now no longer necessary, and that in lieu thereof an application for leave to issue execution may be made under the above rule.

Every person to whom any money or costs is or are payable under a judgment, may, immediately after the judgment is entered, sue out writs of *feri facias* or *elegit* to enforce payment thereof; but if the judgment is for payment within a period therein mentioned, no such writ can be issued until after the expiration of such period; and the court or judge, at the time of giving judgment, or afterwards, may shorten or extend the time for issuing execution (O. 42, r. 15). As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment (O. 42, r. 18). Where six years have elapsed since the judgment, or any change has taken place by death or otherwise (a) in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the court or a judge for leave to issue execution accordingly (b). And such court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties be tried in any of the ways in which any question in an action may be tried. And in either case such court or judge may impose such terms, as to costs or otherwise, as may seem just.

When to  
be issued.

(a) Before the Judicature Acts the mode of proceeding in these cases was by writ of revivor or, in some cases, by entering a suggestion on the roll: see C. L. P. Act, 1852, ss. 129—134. The writ of revivor was directed to the party alleged to be liable to the execution, and called on him to shew cause why execution should not be awarded. Such party could not set up any defence which might have been pleaded to the original action.

(b) In a personal action the party entitled to execution is the executor or administrator of the person in whose favour the judgment is given.

**PART VI.** (O. 42, r. 19). It seems that where there are two or more plaintiffs or defendants in a personal action, and one dies within six years after the judgment and before execution issued, execution by *fi. fa.* or *ca. sa.*, when it will lie, may be sued out without any application to the court or a judge. The *fi. fa.* should be executed against the survivors only. If, *pending* an action by a woman she marry and then obtain judgment, execution may issue thereupon by the authority of the husband without any order for that purpose (C. L. P. Act, 1852, s. 141). So, if *pending* an action against a woman she marry and afterwards judgment be obtained against her, execution may issue against the wife alone, without any order for that purpose, or an order may in some cases be obtained for leave to issue execution against the husband and wife. It seems that if judgment be obtained for a *feme sole*, and she afterwards marry before execution issued, an order should be obtained for leave to issue execution by the husband and wife; though it seems that if a judgment be obtained against a *feme sole* and she afterwards marry an execution may issue against the wife alone without any order for that purpose. As noticed *ante*, p. 37, the Married Women's Property Acts, 1870 and 1874, have made a material difference in the law as to a husband's liability for his wife's torts and debts, &c., committed and contracted before marriage.

If a party be discharged by the bankrupt Acts from the payment of money recovered by a judgment, execution should not issue against him for the recovery of it.

Auditâ  
querelâ  
abolished.

No proceeding by *auditâ querelâ* can now be used; but any party against whom judgment has been given may apply to the court or a judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the court or judge may give such relief and upon such terms as may be just (O. 42, r. 22).

Forms  
of writs.

Some writs of execution, such as writs of *fi. fa.*, *elegit*, and *ca. sa.*, are directed to the sheriff of the county where they are to be executed, or, where he is interested, to other parties (C. P. L. Act, 1852, s. 121; *ante*, p. 13). Some writs, as writs of *mandamus* and injunction, are directed to the defendant himself, and the forms in Appendix (F), which may be used with such variations as circumstances may require, show how some other writs are directed. Every writ of execution must bear date of the day on which it is issued (O. 42, r. 12), and is tested in the name of the Lord Chancellor, or, if the office of Lord Chancellor be vacant, in the name of the Lord Chief Justice of England (O. 2, r. 8).

Writs of execution to be executed by the sheriff are usually made returnable immediately after the execution thereof, though it seems they may be made returnable on a day certain (3 & 4 W. 4, c. 72, s. 2, r. 72, H. T. 1853). CH. XXVI.

Every writ of execution must be indorsed with the name and place of abode or office of business of the solicitor suing out the same, and when he sues it out as agent for another solicitor, the name and place of abode of such other solicitor must also be indorsed upon the writ; and where no solicitor is employed to issue the writ, it must be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be (O. 42, r. 11). Indorsements on writs.

Every writ of execution for the recovery of money must be indorsed with a direction to the sheriff, or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 4l. per cent. per annum from the time when the judgment was entered up. In cases where there is an agreement between the parties that more than 4l. per cent. interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed (O. 42, r. 14).

No writ of execution can be issued without the production to the proper officer of the judgment upon which the writ is to issue, or an office copy thereof, showing the date of entry. The officer must be satisfied that the proper time has elapsed to entitle the judgment creditor to execution (O. 42, r. 9). The writ cannot be issued without the party issuing it, or his solicitor, filing a *præcipe* for that purpose, which must contain the title of the action, the reference to the record, the date of the judgment, and of the order, if any, directing the execution to be issued, the names of the parties against whom, or of the firms against whose goods, the execution is to be issued; and must be signed by or on behalf of the solicitor of the party issuing it, or by the party issuing it, if issued in person. The forms in Appendix (E.) may be used, with such variations as circumstances may require (O. 42, r. 10: r. 17, 26th June, 1876). Issuing writs.

A writ of execution, if unexecuted, remains in force for one year only from its issue, unless renewed; such writ may, at any time before its expiration, be renewed by leave of the court or a How long in force.

**PART VI.** judge, be renewed, by the party issuing it, for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the court bearing the date of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and bearing the like seal of the court. A writ so renewed has effect, and is entitled to priority, according to the time of the original delivery thereof (O. 42, r. 16). The production of the writ, or of the notice renewing the same, purporting to be marked with such seal is sufficient evidence of its having been so renewed (O. 42, r. 17).

Levying  
poundage,  
&c. In every case of execution the party entitled to execution may levy the poundage, fees, and expenses of execution, over and above the sum recovered (O. 42, r. 13).

Writ of  
*Fi. Fa.* A writ of *fieri facias* has the same force and effect as it had, and is executed in the same manner as before the Judicature Acts (O. 43, r. 1). And writs of *venditioni exponas*, *distringas nuper vice comitem*, *fieri facias de bonis ecclesiasticis*, *sequestrari facias de bonis ecclesiasticis*, and all other writs in aid of a writ of *fieri facias* or of *elegit*, may be issued and executed in the same cases and in the same manner as heretofore (O. 43, r. 2).

We will now make some remarks as to the writ of *fi. fa.*, and we should premise that many of them apply to the writs of *ca. sa.* and *elegit*, and other writs of execution directed to the sheriff. A form of a writ of *fi. fa.* is given by the Judicature Act, 1875. (See Appendix F.) It commands the sheriff or other person to whom it is directed, that of the goods and chattels of the judgment debtor, he cause to be made a certain sum of money and interest, and that he have the same before the court immediately after the execution of the writ to be paid to the judgment creditor. In general a writ when directed to the sheriff, which is usually the case, is taken to the sheriff's office where a warrant is made out to one of the sheriff's officers to execute it. It may, however, be made out to a special bailiff, nominated by the creditor or his solicitor.

The writ should be executed within a reasonable time. It may be executed, with certain exceptions, anywhere in the county, &c., to the sheriff of which the writ is directed. The sheriff cannot break open an outer door or window of a dwelling house in order to execute a writ of execution, unless it be a writ of *habere facias possessionem*, in which case he may, if necessary, break open the door if he be denied entrance by the tenant (5 Co. 91). If necessary,

the sheriff must raise the *posse comitatus* in order to execute Ch. XXVI. a writ of execution.

The officer to whom the warrant is directed, seizes the debtor's goods, and if the money directed to be levied be not paid, the goods are sold and the net proceeds paid to the creditor. The goods cannot be delivered to the creditor in satisfaction of his debt, but they may be sold to him at their value. The sheriff, as we have already seen, is entitled to levy his poundage and expenses. Before removing goods from the premises on which they are, certain arrears of rent and taxes must be paid (8 A. c. 14 ; 43 G. 3, c. 99, s. 37). By the 7 & 8 Vict. c. 96, s. 67, "No landlord of any tenement, let at a weekly rent, shall have any claim or lien upon any goods taken in execution under the process of any court of law for more than four weeks' arrears of rent ; and if such tenement shall be let for any other term less than a year, the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment." See 14 & 15 Vict., c. 25, s. 2, *the enactment as to growing crops* being liable to distress for rent when taken in execution.

By the 1 & 2 Vict., c. 110 s. 12 (a), money, bank notes,

(a) This section enacts, "That, by virtue of any writ of *feri facias* to be sued out of any superior or inferior courts, after the time appointed for the commencement of this Act, [1st October, 1838], or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank notes, (whether of the Governor and Company of the Bank of England, or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money (*Stokes v. Cowan*, 30 L. J. Ch. 882), belonging to the person against whose effects such writ of *feri facias* shall be sued out ; and may and shall pay or deliver to the party suing out such execution any money or bank notes which shall be so seized, or a sufficient part thereof ; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, as a security or securities for the amount by such writ of *feri facias* directed to be levied, or so much thereof as shall not have been otherwise levied and raised ; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived (*Mutton v. Young*, 4 C. B. 371), and that the payment to such sheriff or other officer by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty, or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty, or other security ; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied ; and if, after satisfaction of

## PART VI.

cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, may be seized under a *f. fa.* and dealt with as mentioned in that enactment. A lease for years belonging to the debtor may be sold under a *f. fa.* Corn and other things which are raised by the industry of man may be taken in execution. As to the seizure and sale of straw, &c., on lands let to farm, see 56 G. 3, c. 50. By 8 & 9 Vict. c. 127, s. 8, the wearing apparel and bedding of a judgment debtor or his family, and the tools and implements of his trade, the value of such articles not exceeding 5*l.*, are not liable to seizure under an execution.

The sheriff must take care and seize only the goods of the debtor; if the goods of a stranger be taken, the sheriff may be liable to an action. Where goods, after seizure, are claimed by a third party, the proper course for the sheriff to pursue is, in general, to take advantage of the Interpleader Act as mentioned, chap. 32.

With regard to executions against the goods of a bankrupt, enactments on this subject have from time to time been made in order to prevent any hardship arising from the title of the trustees having reference back to an act of bankruptcy. By the Bankruptcy Act, 1869, s. 95 (the enactment now in force), subject and without prejudice to the provisions of this Act, relating to the proceeds of the sale and seizure of the goods of a trader (see s. 87, *post* 169), and avoiding certain fraudulent preferences (sec. 92), the following transactions (amongst others), by and in relation to the property of a bankrupt, are valid, notwithstanding any prior act of bankruptcy. "Any execution or attachment against the goods of any bankrupt executed in good faith by seizure and sale before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being executed by seizure and sale, notice of any act of bankruptcy committed by the bankrupt and available

the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued: provided, that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty, or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action."

against him for adjudication." It is important, therefore, CH. XXVI. sometimes, where an execution issues against a person who is likely to become a bankrupt, to sell under the execution as soon as possible. An execution creditor only requires the protection of this section where an act of bankruptcy has been committed prior to the seizure. A trader debtor commits an act of bankruptcy if an execution for not less than fifty pounds is executed by seizure and sale of his goods (s. 6), (*Slater v. Pinder*, 41 L. J. Ex. 66). Where the goods of a trader are taken in execution for a sum exceeding fifty pounds in respect of a judgment (*Howes v. Young*, 45 L. J. Ex. 499), the sheriff is to retain the proceeds of the sale in his hands for a period of fourteen days, and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader, is to hold such proceeds after deducting expenses, on trust to pay the same to the trustee under the bankruptcy; but if no notice of such petition is served, or if, after such notice, the trader is not adjudged a bankrupt on such petition, or any other petition on which the sheriff has notice, he may deal with the proceeds of the sale in the same manner as if no notice of the presentation of the petition had been served on him (s. 87). Where the sheriff has paid to the execution creditor the proceeds of an execution for a sum of more than 50*l.* against the goods of a trader, after retaining the same for fourteen days, according to the provisions of this section, the creditor is entitled to retain the amount notwithstanding the bankruptcy of the debtor within a year from the seizure and sale. (*Ex parte Villars, re Rogers*, 43 L. J. B. 76.) Money paid by the execution debtor to a sheriff's officer in part payment of the execution creditor's debt, and in order to prevent the levying of execution, is not proceeds of sale of goods taken in execution within this section, and if paid to and accepted by the creditor, may be retained by him notwithstanding the bankruptcy within 14 days. (*Ex parte Brooke*, 43 L. J. B. 49.)

In some cases goods may be seized under a *fi. fa.* though the debtor has assigned them before the seizure. At common law the debtor's goods and chattels are bound by the writ of execution from the time of its teste. By 29 C. 2, c. 3, s. 16, such goods are bound, as against purchasers for valuable consideration, from the time of the delivery of the writ to the sheriff's deputy to be executed and not from the time of its teste; and by 19 & 20 Vict. c. 97, s. 1, no writ of execution shall prejudice the title to the goods of a debtor acquired by a person *bond fide* and for a valuable consideration

From what time debtor's goods bound.

PART VI. before the actual seizure thereof by virtue of such writ, provided such person had not at the time when he acquired such title notice that such writ, or any other writ, by virtue of which the goods of such owner might be seized, had been delivered to and remained unexecuted in the hands of the sheriff. &c. See 17 & 18 Vict. c. 36, the Bills of Sale Act, which makes void, as against execution creditors, certain bills of sale unless filed, &c. A merely equitable assignment of chattels is within this act (*Edwards v. Edwards*, 45 L. J. Ch. 391). A mere receipt given on the sale of goods is not (*Graham v. Wilcockson*, 46 L. J. Ex. 55). An attesting witness to a bill of sale who has no occupation may be described therein as a gentleman (*Smith v. Cheese*, 45 L. J. C. P. 156).

When  
sheriff  
has several  
writs.  
Return of  
writ.

If the sheriff at the time he seizes the goods has several writs of *fi. fa.* against the debtor in his possession, he should satisfy that first which was first delivered to him.

In general the sheriff does not return a writ of execution unless ordered to do so; but in some cases it is absolutely necessary that the writ should be returned. The mode of compelling the sheriff to return the writ will be found in Chit. Arch. by Prentice, 12 ed. p. 625. A rule issues ordering the sheriff to return the writ, and if such rule is not obeyed the sheriff is liable to an attachment. The sheriff may return *fieri feci*, that is, that he has levied the sum named in the writ, or, if the fact be so, he may return *fieri feci* as to part and *nulla bona* as to the remainder. If the sheriff has taken goods, but they remain in his hands for want of buyers, he should return such facts; or if the sheriff has not been able to find any goods in his bailiwick liable to the execution he should return *nulla bona*. He must take care that his return be true, or he will be liable to an action for a false return at the suit of the party injured by it.

If *fieri feci* be returned the money may be recovered by application to the court, or by action. If the sheriff return that he has taken goods but that they remain in his hands for want of buyers, and he is still in office, a writ of *venditioni exponas* may be issued in order to compel a sale. Upon this writ the sheriff must sell. Where the sheriff has gone out of office after returning that the goods remain in his hands for want of buyers, the execution creditor must sue out a writ called a *distringas nuper vice comitem*, directed to the present sheriff. Under this writ, if the sheriff who made the return does not sell the goods and pay over the money he will forfeit issues to the amount of the debt.

Alias writ.

Where *nulla bona* is returned an *alias fi. fa.* may be sued out, and if *nulla bona* be returned to that a *pluries fi. fa.*



may be sued out. So after such a return a *ca. sa.* (where it will lie) or an *elegit* may be issued. CH. XXVI.

If the sheriff, to a common *feri facias*, returns *nulla bona*, and that the defendant is a beneficed clerk, having no lay fee in his county, the plaintiff may sue out a *feri facias de bonis ecclesiasticis*, directed to the bishop of the diocese, or to the archbishop (during the vacancy of the bishop's see), commanding him to make of the ecclesiastical goods and chattels belonging to the defendant, within his diocese, the sum therein mentioned. Execution against clergymen.

Or, instead of this writ, the plaintiff may sue out a writ of *sequestrari facias*, which commands the bishop to enter into the rectory and parish church, and to take and sequester and hold same, until of the rents, tithes, and profits thereof, and of the other ecclesiastical goods of the defendant, he has levied the plaintiff's debt. A sequestration issued on a *sequestrari facias* is a charge upon all the rents and profits including the glebe land of the benefice, except the parsonage house, in which the incumbent is bound to reside. The bishop, with reference to these writs, is in the same position as the sheriff with reference to writs in ordinary cases, and is bound to obey the orders of the court, as to their execution, &c. See further, as to proceedings on these writs, Chitty's Arch. by Prentice, 12th ed., p. 1283, and 12 & 13 Vict. c. 67.

If a *fi. fa.* be improperly issued it may be set aside, and goods, &c., levied under it may be ordered to be restored. If a writ be irregular the party at whose instance it issued, and his solicitor, may justify under it unless set aside; in which case they cannot do so. The sheriff and persons acting under him are in general protected by a writ good on the face of it issuing from a court having jurisdiction, although it be irregular, and set aside on that account, provided they do not join in the same plea with the party. A *bonâ fide* purchaser of the debtor's goods from the sheriff has a good title to the same, though the writ is set aside for irregularity; but not if the writ be void. Setting aside writ for irregularity.

A writ of execution may in some cases be amended.

A form of a writ of *elegit* will be found in appendix F. This writ has the same force and effect as it had, and is executed in the same manner as before the Judicature Acts, and writs in aid of this writ may be issued as before such Acts (O. 43, rr. 1 & 2, *ante*, p. 166). Writ of Elegit.

By statute Westm. 2 (13 E. 1), c. 18, "where a debt is recovered or acknowledged in the King's Court, or damages awarded, it shall be in the election of him that sueth to

PART VI. have a *fi. facias* to the sheriff to levy the debt upon the lands and chattels of the debtor, or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough), and the one-half of his land, until the debt be levied, upon a reasonable price or extent." From the election given to the plaintiff by this statute, and from the entry of the award of this execution on the roll "*quod elegit sibi executionem*," &c., the writ of *elegit* derives its name.

The 10th sect. of the Statute of Frauds (29 C. 2, c. 3), in order to subject trust estates to execution, enacts that lands, &c., held in trust for the debtor may be taken in execution in the same way as if he had been seised of the same.

By the 1 & 2 Vict. c. 110, s. 11, as a general rule, the *elegit* creditor may now extend the whole of the debtor's lands instead of a moiety; and by this enactment, subject to the rights of the lord of the manor, the debtor's customary and copyhold lands may be extended; and so may lands over which the debtor has any disposing power which he may, without the assent of any other person, exercise for his own benefit (a).

By 27 & 28 Vict. c. 112, s. 1, a judgment entered up after the 29th July, 1864, does not affect land until it has been delivered in execution (see 23 & 24 Vict. c. 38).

A writ of *elegit* is issued in the same way as a writ of *fi. fa.*, and many of the remarks made with respect to the latter writ apply to the former.

Under an *elegit*, the sheriff impanels a jury, who inquire what goods and chattels the debtor has, and appraise the same, and also inquire as to his lands and tenements, and their value. After the inquisition, the sheriff delivers to the execution creditor all the goods and chattels of the debtor (except his oxen and beasts of the plough), at the value set upon them by the jury, and if the goods be sufficient to satisfy the debt, the lands cannot be extended. If the goods are insufficient, the sheriff delivers the legal possession of all the lands, &c., of the debtor to the creditor, and returns the writ to the court. If the actual possession of the lands in the occupation of the debtor cannot be obtained, an action may be brought for the purpose of getting same.

(a) See 18 & 19 Vict. c. 15, s. 11, as to estates vested in mortgagees who have been paid off not being extendible as against *bond fide* purchasers, &c.; and see Bankruptcy Act, 1869, s. 95, when execution against the land of a bankrupt is valid notwithstanding any prior act of bankruptcy.

Where land is extended upon an *elegit*, no other writ of CH. XXVI. execution but an *elegit* can be sued out against the debtor's person or property, unless the creditor be evicted from the lands extended. When the judgment is satisfied the debtor may recover back the land. As to the mode of doing this, see Chit. Arch. by Prentice, 12 ed. p. 692; 1 & 2 Vict. c. 110, s. 11. As to obtaining an order for the sale of the debtor's interest in the land, see 27 & 28 Vict. c. 112, ss. 4, 5, 6.

A *capias ad satisfaciendum* is a writ directed to the sheriff *Ca. Sa.* by which he is commanded to take the debtor, and him safely keep, so that he may have him in court immediately after the execution of the writ, to *satisfy* the execution creditor the amount of the moneys recovered by the judgment, together with interest upon the same. This writ can now be issued in a few cases only. By 7 & 8 Vict. c. 96, s. 59, it does not lie unless the judge who tries the cause certifies that the defendant has been guilty of fraud, &c., except where the sum recovered exceeds £20, exclusive of costs. And the effect of the Debtor's Act, 1869, s. 4, is that no person can in general be arrested or imprisoned for making default in payment of a sum of money, except where default is made in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract,—where default is made by a solicitor in payment of costs ordered to be paid for misconduct as such, or in payment of a sum of money ordered to be paid in his character of an officer of the court making the order;—and where default is made in payment of sums in respect of the payment of which orders are in this Act authorised to be made. There is also excepted from this enactment—"default by a trustee or person acting in a fiduciary character and ordered to pay by a court of equity any sum in his possession or under his control." No person can be imprisoned in any case excepted from the operation of this enactment for a longer period than one year.

A *ca. sa.* does not lie against a member of the royal family; nor against peers or peeresses; nor members of the House of Commons during the time of privilege; nor against ambassadors or their servants; nor against seamen or soldiers in her Majesty's service, unless in an action of a debt, for 30*l.* or upwards, contracted previously to their entering the service; nor against the servants in ordinary or menial servants of the Queen regnant unless leave has been previously obtained of the lord chamberlain of the household; nor in certain other cases.

## PART VI.

The sheriff must execute a writ of *ca. sa.* as he is commanded thereby (a). He cannot receive from the debtor the money in respect of which the writ has issued. If the debtor after he is arrested wishes to pay the money and get his discharge, he must pay the same to the creditor. A payment, however, to the solicitor in the cause by whom the *ca. sa.* was issued, will, in default of notice to the contrary, suffice for this purpose. (C. L. P. Act, 1852, s. 126.)

The sheriff, if he has been unable to find the debtor in his bailiwick, returns *non est inventus*. If he has taken the debtor, and has him in custody, the sheriff returns *cepi corpus et paratum habeo*. The sheriff may return that the debtor is so ill that he cannot be removed without danger to his life. A rescue is in general not a good return. Many of the remarks made, *ante*, p. 170, apply to the return, and the mode of compelling the return to this writ.

A debtor cannot be imprisoned under this writ for more than a year (Debtors Act, 1869, s. 4). In general, if a debtor be taken on a *ca. sa.*, no other execution can issue against him for the moneys in respect of which the *ca. sa.* issued, though there are some few exceptions to this rule, as where there has been an escape. The sheriff, for an escape of the debtor, is liable to an action for the damages sustained by the creditor; the true measure of the damages being the value of the custody of the debtor at the moment of the escape (5 & 6 Vict. c. 98).

By Debtors Act, 1869, s. 5 (R. M. T. 1869), a judge at chambers has power to commit to prison (b) for a term not exceeding six weeks, or until payment of the sum due, any person who has refused or neglected to pay any debt due from him under an order or judgment, if he has the means of paying the debt, or has had such means since the date of the order or judgment. For the purpose of this section a judge may order a debt to be paid by instalments. The order of committal is, subject to the prescribed rules (R. M. T. 1869), issued, obeyed, and executed in the like manner as a writ of *ca. sa.* An imprisonment under this section does not operate as a satisfaction of the debt, or prevent executions against the lands, goods, or chattels of the debtor being sued out (*Washer v. Elliott*, 45 L. J. C. P. 144). In M. T. 1869, rules of court were made for regulating the practice under this enactment which will be found at the end of App. F.

Writ for

By O. 42, r. 4, a judgment for the recovery of any

(a) As to the temporary privilege from arrest, see *ante*, p. 100.

(b) A form of order is given by R. M. T. 1869; see form in App. F.

property other than land or money may be enforced by writ CH. XXVI. for delivery of the property—by writ of attachment—by writ of sequestration; and, by O. 49, a writ for delivery of any property other than land or money may be issued and enforced in the manner heretofore in use in actions of delivery of a chattel, &c. detinue in the superior courts of common law.

By the Common Law Procedure Act, 1854, s. 78, the court or judge, upon the application of the plaintiff in an action for the detention of a chattel, may order that execution issue for the return of the same, without giving the defendant the option of retaining it upon paying the value assessed. If the chattel cannot be found, and not otherwise ordered, the sheriff is to distrain the defendant by his lands and chattels, till he render such chattel, or, at the option of the plaintiff, the sheriff may cause to be made of the defendant's goods the assessed value of the chattel. The plaintiff may either by the same or a separate writ of execution have made of the defendant's goods the damages, costs, and interest in the action.

By 19 & 20 Vict. c. 97, s. 2, in actions for breach of contract to deliver specific goods for a price in money, under certain circumstances execution may issue for the delivery of the goods.

By the Common Law Procedure Act, 1854, power was first given to a judgment creditor to attach debts due to his debtor for the purpose of satisfying the judgment. The Judicature Act, 1875, contains provisions as to the attachment of debts, which we will now notice. Under this Act debts due, or accruing due (a) from a third person to a judgment debtor may be attached to satisfy a judgment whereby money is recovered or ordered to be paid. Attach-ment of debts.

By O. 45, r. 1, where a judgment is for the recovery by or payment to any person of money, the court or a judge may, on the application of the party entitled to enforce it, order that the judgment debtor be orally examined as to what debts are owing to him, before an officer of the court, or some other person, and may order the production of any books or documents.

By O. 45, r. 2, the court or a judge may, upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his solicitor stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is

(a) *Tapp v. Jones*, L. R. 10 Q. B. 591, 44 L. J. Q. B. 127.

PART VI. within the jurisdiction, order that all debts owing or accruing (Bitt. 82) from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court or a judge or an officer of the court, as such court or judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

In general, debts (a) due to the debtor in which he is beneficially interested can be thus attached. On a judgment against several, a debt due to any one or more of them may be attached. Where the garnishee has a cross claim against the debtor, the judgment creditor can only recover the balance against the garnishee.

Service of an order that debts due or accruing to the judgment debtor be attached, or notice thereof to the garnishee, in such manner as the court or judge directs, binds such debts in his hands (O. 45, r. 3).

If the garnishee does not forthwith pay into court the amount due from him (b), or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him, or if he does not appear upon summons, then the court or judge may order execution to issue, and it may issue accordingly, without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment debt (O. 45, r. 4).

If the garnishee disputes his liability, the court or judge may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined (O. 45, r. 5).

If the garnishee suggests that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the court or judge may order such third person to appear, and state the nature and particulars of his claim upon such debt (O. 45, r. 6). After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the court or judge may order to appear, or in case of such third person

(a) See *Richardson v. Elmet*, L. R. 2 C. P. 9; *Stevens v. Phelps*, 44 L. J. Ch. 689, L. R. 10 Ch. 417.

(b) *Sampson v. Seaton and Beer Rail. Co.*, L. R. 10 Q. B. 28, 44 L. J. Q. B. 31.

not appearing when ordered, the court or judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding rules of this Order, and may bar the claim of such third person, or make such other order as may be thought fit, upon such terms, with respect to the lien or charge (if any) of such third person, and to costs, as may be just and reasonable (O. 45, r. 7). Ch. XXVI.

Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid is a valid discharge to him as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside, or the judgment reversed (O. 45, r. 8).

The costs of any application for an attachment of debts and of any proceedings arising from or incidental to such application, are in the discretion of the court or a judge (O. 45, r. 10).

There is kept by the proper officer a debt attachment book, and in such book entries must be made of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered, and otherwise; and copies of any entries made therein may be taken by any person upon application to the proper officer (O. 45, r. 9).

By virtue of O. 46, r. 1; 1 & 2 Vict. c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, s. 1, orders may be made by a divisional court or by a judge, charging government stock and stocks and shares in public companies in England, standing in the name of the debtor in his own right, or in the name of a person in trust for him, with the payment of a judgment debt and interest. Such charge cannot be enforced for six calendar months after the order (*Burns v. Irving*, 46 L. J. Ch. 423; *Widgerry v. Tepper*, 21 July, 1877 (C. A.)). Charging stock or shares.

Any person claiming to be interested in any stock transferable at the Bank of England standing in the name of any other person may sue out a writ of *distringas* pursuant to the statute 5 Vict. c. 5, as heretofore. Such writ to be issued out of any office of the High Court in London, where writs of summons are issued (O. 46, r. 2).

By O. 47, where a person is by a judgment directed to pay money into court (a), or to do any other act in a limited time, and after due service of such judgment refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment is at the expiration of the time limited for the performance thereof, entitled, with- Writ of sequestration.

(a) See Order 42, r. 2, *ante*, p. 161.

**SECRET**

1. The purpose of this document is to provide information regarding the activities of the [redacted] in the [redacted] area.

2. The [redacted] has been observed in the [redacted] area, and it is believed that it is engaged in [redacted] activities.

3. The [redacted] has been observed in the [redacted] area, and it is believed that it is engaged in [redacted] activities. The [redacted] has been observed in the [redacted] area, and it is believed that it is engaged in [redacted] activities.

4. The [redacted] has been observed in the [redacted] area, and it is believed that it is engaged in [redacted] activities. The [redacted] has been observed in the [redacted] area, and it is believed that it is engaged in [redacted] activities.

5. The [redacted] has been observed in the [redacted] area, and it is believed that it is engaged in [redacted] activities. The [redacted] has been observed in the [redacted] area, and it is believed that it is engaged in [redacted] activities.

6. The [redacted] has been observed in the [redacted] area, and it is believed that it is engaged in [redacted] activities. The [redacted] has been observed in the [redacted] area, and it is believed that it is engaged in [redacted] activities.

7. The [redacted] has been observed in the [redacted] area, and it is believed that it is engaged in [redacted] activities. The [redacted] has been observed in the [redacted] area, and it is believed that it is engaged in [redacted] activities.



their costs and expenses, for delivery up of possession, and for the discharge of the sequestrators from all liability in respect of their office. As to sequestrators taking books, &c., where a party is in contempt for not delivering same, see 11 G. 4 & 1 W. 4, c. 36, 23 & 24 Vict. c. 149, ss. 2 and 5; and see further as to the proceedings on a writ of sequestration, Dan. Ch. Pract., 920 *et seq.* CH. XXVI.

A writ of attachment is issued for a contempt of court. A form of this writ will be found in App. (F.), No. 9. It has the same effect as a writ of attachment issued out of the Court of Chancery had before the passing of the Judicature Acts (O. 44, r. 1). The writ cannot be issued without the leave of the court or a judge, to be applied for on notice to the party against whom the attachment is to be issued (O. 44, r. 2: *Abud v. Riches*, 45 L. J. Ch. 649, L. R. 2 Ch. 528; *Dallas v. Glyn*, 46 L. J. Ch. 51). Writ of attachment.

In Chancery, if a defendant was taken on an attachment for want of appearance or answer, he must have gone to prison for safe custody, or put in bail to the sheriff; for, as the arrest was only to compel an appearance in court, at the return of the writ or an answer to the interrogatories, that purpose was equally answered whether the sheriff detained the defendant's person or took sufficient security for the appearance or answer. The sheriff might, after taking the defendant as above have let him go at large without any sureties, but this was at the sheriff's peril, as he would be liable if the defendant was not forthcoming at the proper time. But an attachment out of Chancery for the non-performance of a decree or order was not a bailable process, and a person taken upon it was committed to prison, and not suffered to go at large. If the sheriff neglected his duty in this respect, he was liable for the loss actually sustained by his neglect. When a person was taken on an attachment he remained in custody until he cleared his contempt by performing the act required of him and paying the costs of the contempt, or until he was discharged in due course of law. C. O. 29, r. 3, provides that when a person is committed for breach of a decree or order he shall not be released until he has performed the same in all things immediately to be performed, and has given such security as the court may direct, to perform the other parts (if any) of the decree or order.

The sheriff had to make a return to the writ.

As mentioned, *ante*, by Common Law Procedure Act, 1854, Writs of an action for *mandamus* for the purpose of enforcing certain duties may be brought. By ss. 71 and 72 of this Act, if judgment be given for the plaintiff that a *mandamus* do issue, Writs of mandamus and injunction.

PART VI. the court may, if it thinks fit, besides issuing execution for the costs and damages, issue a peremptory writ of *mandamus* directed to the defendant commanding him forthwith to perform the duty to be enforced. By the Common Law Procedure Act, 1860, s. 32, the writ, unless otherwise ordered by the court or a judge, commands the defendant to pay to the plaintiff the costs of preparing, issuing, and serving the same; and payment of such costs may be enforced in the same manner as costs payable under a rule of court. No return to this writ, except that of compliance, can be allowed, but time to return it may, upon sufficient grounds, be allowed by the court or a judge. By the Common Law Procedure Act, 1854, s. 73, the writ of *mandamus* has the same force and effect as a peremptory writ of *mandamus* issued out of the Queen's Bench Division of the High Court of Justice, and in case of disobedience may be enforced by attachment; and in such case, by s. 74, provision is made for doing the act ordered to be done at the expense of the defendant.

The Common Law Procedure Act, 1854, also contains provisions as to issuing writs of injunction where the same are claimed under that Act, and enforcing the same. These writs are issued and enforced under this Act of Parliament much in the same way as a peremptory writ of *mandamus* is when issued under such Act (ss. 81, 82; C. L. P. Act, 1860, ss. 32, 33).

As these provisions respecting peremptory writs of *mandamus* and writs of injunction are not of much practical utility since the Judicature Acts, they are not further noticed.

## PART VII.

### CHAPTER XXVII.

#### APPEAL TO HER MAJESTY'S COURT OF APPEAL.

ONE of the divisions of the Supreme Court established by the Judicature Acts, under the name of Her Majesty's Court of Appeal, has appellate jurisdiction with such original jurisdiction as hereinafter mentioned, as may be incident to the determination of any appeal (J. A. 1873, s. 4).

Her Majesty's Court of Appeal is a superior court of record, and is constituted as follows:—There are five *ex officio* judges thereof, viz., the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer. There are six ordinary judges of the court, who are styled Lords Justices of Appeal. Under certain circumstances, at the request of the Lord Chancellor, judges of the Queen's Bench, Common Pleas, Exchequer, and Probate, Divorce, and Admiralty Divisions of the High Court of Justice, not being *ex officio* judges of the Court of Appeal, may act as judges of such court; but it is enacted that no judge of the Court of Appeal shall sit as a judge on the hearing of an appeal from any judgment or order made by himself, or by any divisional court, of which he was and is a member (J. A. 1875, s. 4; J. A. 1876, ss. 16 and 19). A judge of the High Court of Justice is not disqualified from sitting in the Court of Appeal on an appeal from a divisional court composed of other judges of the division of which he is a member (*Fisher v. Val De Travers Asphalt Paving Co.*, 45 L. J. C. P. 135). Constitution of Court of Appeal.

By the Judicature Act, 1875, s. 6, the Lord Chancellor is president of the Court of Appeal; the other *ex officio* judges thereof rank in the order of "their present respective official precedence." The ordinary judges of this court, if not entitled to precedence as peers or privy councillors, rank ac-

**PART VII.** cording to the priority of their respective appointments as such judges. Under certain circumstances, a judge of the Court of Appeal may act as a judge of the High Court (J. A. 1873, s. 51).

Jurisdiction and powers of court.

By the Judicature Act, 1873, s. 18, there is transferred to and vested in the Court of Appeal all jurisdiction and powers of the courts following (that is to say);

1. All jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery, in the exercise of his and its appellate (*a*) jurisdiction, and of the same Court as a Court of Appeal in Bankruptcy.

2. All jurisdiction and powers of the Court of Appeal in Chancery of the county palatine of Lancaster and all jurisdiction and powers of the Chancellor of the duchy and county palatine of Lancaster when sitting alone or apart from the Lords Justices of Appeal in Chancery as a judge of rehearing or appeal from decrees or orders of the Court of Chancery of the county palatine of Lancaster.

3. All jurisdiction and powers of the Court of the Lord Warden of the Stannaries assisted by his assessors, including all jurisdiction and powers of the said Lord Warden when sitting in his capacity of judge. (*b*)

4. All jurisdiction and powers of the Court of Exchequer Chamber (*c*).

5. All jurisdiction vested in or capable of being exercised by Her Majesty in Council, or the Judicial Committee of Her Majesty's Privy Council upon appeal from any judgment, or order of the High Court of Admiralty, or from any order in lunacy made by the Lord Chancellor, or any other person having jurisdiction in lunacy.

By the Judicature Act, 1873, s. 19, the Court of Appeal has (save as mentioned in the Judicature Acts) jurisdiction and power to hear and determine appeals from any judgment or order (*d*) of Her Majesty's High Court of Justice, or of any judges or judge thereof, subject to the provisions of the Acts, and to the rules and Orders of court for regulating the terms and conditions on which such appeals are allowed. For all the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction and the

(*a*) The jurisdiction of the Court of Appeal under this sub-section is solely appellate: *Re Hutley*, 45 L. J. Ch. 79.

(*b*) See 18 & 19 Vict. c. 32, s. 26.

(*c*) At the time of the passing of this Act, error lay from the Queen's Bench, Common Pleas, and the law side of the Exchequer to the Exchequer Chamber (11 G. 4 & 1 W. 4, c. 70, s. 8).

(*d*) *Sugden v. Lord St. Leonard*, 45 L. J. Prob. 49.

amendment, execution, and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal, such court has all the power, authority, and jurisdiction by the Judicature Acts, vested in the High Court of Justice.

An appeal lies from the London Court of Bankruptcy to the Court of Appeal (J. A. 1875, s. 9). By the Judicature Act, 1876, s. 20, where by statute the decision of any court or judge the jurisdiction of which is transferred to the High Court of Justice is to be final, an appeal does not lie (*a*). By the Judicature Act, 1873, s. 49, no order made by the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the court, is subject to any appeal, except by leave of the court or judge making such order. An appeal lies by a defendant against an order directing him to pay the costs of a motion to commit him for breach of an injunction, upon the ground that he was not guilty of a breach of the injunction, as these costs were not in the discretion of the judge unless there was such a breach (*Witt v. Corcoran*, 45 L. J. Ch. 603; *Etherington v. Wilson*, 45 L. J. Ch. 153).

By the Judicature Act, 1873, s. 47, no appeal lies from any judgment of the High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question has been reserved for the consideration of the judges under the Act of the 11 & 12 Vict. c. 78, under which Crown cases are reserved for the consideration of the judges (see O. 62). The operation of s. 47 of the Judicature Act, 1873, in prohibiting appeals in criminal matters extends to all orders of the High Court in criminal cases; even where the original criminal proceedings were not in the High Court. Where the Queen's Bench Division was applied to for a *certiorari* to quash a conviction for trespassing in pursuit of game, on the ground that there was a *bond fide* claim of right, ousting the jurisdiction of the magis-

(a) In the following instances the decision is final :—

On a case stated by Justices of the Peace, under 20 & 21 Vict. c. 43, ss. 2, 6;

On an appeal from a County Court, under 13 & 14 Vict. c. 61, s. 14; or, 19 & 20 Vict. c. 108, s. 68; or, 28 & 29 Vict. c. 29, s. 18 (see 38 & 39 Vict. c. 50, s. 6, *post*, p. 196.)

On a case stated by a revising barrister, under 6 Vict. c. 18, ss. 42, 66;

On the trial of election petitions, under the Parliamentary Elections Act, 1868, s. 11, sub-s. 13;

On a case stated under the Corrupt Practices (Municipal Elections) Act, 1872, s. 15, sub-s. 6;

On a case stated by the Railway Commissioners under the Railway Regulation Act, 1873, s. 26.

**PART VII.** trates, and that court refused the order,—Held, that this was a proceeding in a criminal matter, and that no appeal lay to the Court of Appeal (*R. v. Fletcher*, 46 L. J. M. C. 4 ; *R. v. Steel*, 46 L. J. M. C. 1).

Where a trial has been by a judge without a jury, an application for a new trial must be to the Court of Appeal (r. 5, 7th Nov. 1876). As to an application to set aside a judgment ordered to be entered by the judge who tried the action being made to the Court of Appeal, see r. 7, 7th Nov. 1876, *ante*, p. 144.

**Divisional  
Courts.**

Every appeal, where the subject-matter of it is a final order, decree, or judgment, must be heard before not less than three judges of the Court of Appeal ; and where the subject-matter of the appeal is an interlocutory order, &c., the appeal must be heard before not less than two judges of the said court ; any doubt which may arise as to whether an order, &c., is final or interlocutory, is determined by the Court of Appeal (J. A. 1875, s. 12). Subject to the said provisions in section 12, the Court of Appeal may sit in two divisions at the same time. By the Judicature Act, 1876, s. 16, orders for constituting and holding divisional courts of the Court of Appeal, and for regulating the sittings of such courts, may be made by the president of the Court of Appeal, with the concurrence of the ordinary judges thereof, or any three of them. By the Judicature Act, 1873, s. 52, in any cause or matter pending before the Court of Appeal, any direction incidental thereto, not involving the decision of the appeal, may be given by a single judge of the court ; and a single judge may during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal ; but every such order may be discharged or varied by the Court of Appeal or a Divisional Court thereof.

**Procedure  
and prac-  
tice.**

The jurisdiction of the Court of Appeal is exercised (so far as regards procedure and practice) in the manner provided by the Judicature Acts and the rules and orders made in pursuance thereof ; and where no special provision is contained therein with reference thereto, it is exercised as nearly as may be in the same manner as the same might have been exercised by the respective courts from which such jurisdiction has been transferred, or by any of such courts (J. A. 1873, s. 23).

**Old prac-  
tice.**

At the time of the Judicature Acts taking effect the judgment of one of the superior courts of law at Westminster could only be reviewed in the Court of Error, *i. e.* the Exchequer Chamber for some defect apparent on the record.

It was so reviewed by taking what was termed proceedings in error in the manner pointed out by the Common Law Procedure Act, 1852, ss. 148, 149, &c., and a writ of error was not in general necessary. Before the passing of this last-mentioned Act error was brought by issuing out of Chancery a writ called a writ of error (2 Saund. 100).

Also before the Judicature Acts, if the judge at the trial of a cause either in his direction or decision mistook the law, as if he misdirected the jury on a point of law or improperly received or rejected evidence, he might be required to seal a bill of exceptions. The mistake must have been on some point of law. The bill of exceptions must have been tendered at the trial before verdict. The substance of it must have been reduced to writing at the time it was tendered, although it need not then have been drawn up in form. It was afterwards drawn up by the counsel for the party tendering it, and settled by the counsel on the other side. If they could not agree upon the form of it, it was settled by the judge. If the bill of exceptions was not tacked to the record, it was necessary that the whole record should be set forth in it. It contained the exception made to the direction or ruling of the judge, together with so much of the evidence, direction, &c., given at the trial as was necessary to make the exception intelligible. If the exception was truly stated in the bill, the judge must have affixed his seal to it (13 Edw. 1, c. 31). When the bill was sealed, both parties were concluded by it as to the truth of the matters contained in it. When it was completed, and judgment had been given, proceedings in error were taken on the judgment, and the matter was determined in the Court of Error. The judgment in the Court of Error was that the former judgment be affirmed or reversed. If the latter, there was a trial *de novo*. (See Chit. Arch., by Prentice, *title*, Bill of Exceptions, *Davenport v. Tyrell*, 2 W. Blac. 679; *Money v. Leach*, 3 Burr. 1742).

By the Judicature Acts, a more extensive right of appeal is given, and the mode of proceeding to review the judgment is altogether altered.

Bills of exception and proceedings in error are now abolished (O. 58, r. 1) (a). And by O. 58, r. 2, all appeals to the Court of Appeal are by way of rehearing (b), and must be brought by notice of motion in a summary way, and

Present  
practice.

(a) See Judicature Act, 1875, s. 22.

(b) See the observations made by the court where the appeal was on a question of fact, decided on *vivâ voce* evidence (*Bigsby v. Dickenson*, 46 L. J. Ch. 280, L. R. 4 Ch. 24).

**PART VII.** no petition, case, or other formal proceeding is necessary. The appeal may be from the whole or any part of any judgment or order.

Within  
what time  
appeal to  
be brought.

No appeal from any interlocutory order (a), or any order or decision made in any matter not being an action (O. 58, r. 9) (b), can, except by special leave (c) of the Court of Appeal, be brought after the expiration of twenty-one days (d), and no other appeal can, except by such leave, be brought after the expiration of one year. The said respective periods are calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal (O. 58, r. 15). Where an interlocutory order has been made, in part granting and in part refusing an application, the time for appealing from so much of the order as refuses the application runs from the date of the refusal, and not from the time of the order being perfected (*Trail v. Jackson*, 46 L. J. Ch. 16, L. R. 4 Ch. 7; *Swindell v. The Birmingham Syndicate*, 45 L. J. Ch. 756; see *Cummins v. Heron*, 46 L. J. Ch. 423). After the time for appealing has expired, the court will not give special leave to appeal upon an *ex parte* application (*Evennett v. Lawrence*, 46 L. J. Ch. 119). Where an *ex parte* application has been refused by the court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within four days from the date of such refusal, or within such enlarged time as a judge of the court below or of the Appeal Court (e) may allow (O. 58, r. 10.)

Notice of  
appeal.

The notice of motion by which the appeal is brought, called the notice of appeal, must state whether the whole or part only of the judgment or order is complained of, and in the latter case must specify such part. The notice, when from any judgment, whether final or interlocutory, is a fourteen days notice, and when from any interlocutory order is a four days notice (O. 58, r. 4). The notice of appeal must be served upon all parties directly affected by the appeal, and it is not necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all

(a) *White v. Witt*, 46 L. J. Ch. 560.

(b) *Re Baillie's Trusts*, 46 L. J. Ch. 330.

(c) *Lord Otho Fitzgerald v. Dawson*, 45 L. J. C. P. 152, where it was desired to appeal against an order made on a demurrer in an action pending when the Judicature Acts came into operation.

(d) *Re Lewer*, 46 L. J. B. 71, a bankruptcy case.

(e) By O. 58, r. 17, wherever under these rules an application may be made either to the court below or to the Court of Appeal, or to a judge of the court below or of the Court of Appeal, it shall be made in the first instance to the court or judge below (*Cooper v. Cooper*, 45 L. J. Ch. 667).



or any parties (a) to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may seem just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. The notice may be amended at any time as to the Court of Appeal may seem fit (O. 58, r. 3).

It is not, under any circumstances, necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the court below should be varied, he must, subject to any special order which may be made, in the case of any appeal from a final judgment give an eight days notice, and in the case of an appeal from an interlocutory order a two days notice of such intention to any parties who may be affected by such contention. The omission to give such notice does not diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the court, be ground for an adjournment of the appeal, or for a special order as to costs (O. 58, rr. 6, 7).

An appeal does not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the court appealed from, or any judge thereof, or the Court of Appeal (b), may so order; and no intermediate act or proceeding is invalidated, except so far as the court appealed from may direct (O. 58, r. 16). The applicant to stay proceedings pending an appeal will, in general, be ordered to pay the costs of the application (*Cooper v. Cooper*, 45 L. J. Ch. 667).

Such deposit or other security for the costs to be occasioned by any appeal must be made or given as may be directed under special circumstances by the Court of Appeal (O. 58, rr. 15, 9 : *Grant v. Banque Franco-Egyptienne*, L. R. 1 C. P. 143 ; *Clarke v. Roche*, 46 L. J. Ch. 372). Special leave is not required in order to serve notice of motion for security for the costs of an appeal (*Grills v. Dillon*, 45 L. J. Ch. 432). In one case (*Wilson v. Smith*, 45 L. J. Ch. 292), the Court of Appeal ordered a deposit of 50*l.* to be made as a security for the costs of the appeal, and stayed the proceedings until it was made. See *Judd v. Green*, 46 L. J. Ch. 257, where an

(a) *Purnell v. Great Western Rail. Co.*, 45 L. J. Q. B. 687, L. R. 1 Q. B. 636 ; where one of several defendants moved for a new trial.

(b) See *ante*, p. 186, note (c).

**PART VII.** appeal was dismissed with costs upon the ground that security for costs was not given after an order for that purpose.

**Entry of appeal for hearing.** The appellant must produce to the proper officer of the Court of Appeal the judgment or order appealed against (*a*), or an office copy thereof, and must leave with him a copy of the notice of appeal to be filed, and such officer must thereupon set down the appeal by entering the same in the proper list of appeals (*b*).

The appeal comes on to be heard according to its order in such list, unless the Court of Appeal or a judge thereof otherwise direct, but it cannot come on for hearing before the day named in the notice of appeal (O. 58, r. 8). Upon the hearing of an appeal two counsel are heard on each side (*Sneesby v. Lancashire, &c. Rail. Co.*, L. R. 1 Q. B. 42, 45 L. J. Q. B. 1).

**How evidence, &c., brought before Court of Appeal.** When any question of fact (*c*) is involved in an appeal, the evidence taken in the court below bearing on such question is, subject to any special order, brought before the Court of Appeal as follows:—

- (*a*) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed (*d*).
- (*b*) As to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the court may deem expedient (O. 58, r. 11).

Where evidence has not been printed in the court below, the court below or a judge thereof, or the Court of Appeal or a judge thereof (*e*), may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order has to bear the costs thereof, unless the Court of Appeal or a judge thereof otherwise orders (O. 58, r. 12: *Bigsby v. Dickenson*, 46 L. J. Ch. 280, L. R. 4 Ch. 24).

The Court of Appeal has full discretionary power to receive

(*a*) *Smith v. Grindley*, L. R. 3 Ch. 80.

(*b*) An appeal must be set down for hearing before the day named in the notice of motion; or, if the court is not then sitting, before the next day of its sitting (*Re The National Funds Ass. Co.* 46 L. J. Ch. 183).

(*c*) *Sugden v. Lord St. Leonards*, 45 L. J. Prob. 49, L. R. 1 P. D. 154.

(*d*) Office copies of affidavits were dispensed with by the Court of Appeal on the hearing of an appeal, on the ground of expense, and an order was made that the officer having the custody of the original affidavits should attend with them upon the hearing of the appeal (*Sickles v. Norris*, 45 L. J. C. P. 148).

(*e*) See *ante*, p. 186, note (*e*).

further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after (a) the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) is admitted on special (b) grounds only, and not without special leave of the court (O. 58, r. 5). If a party wishes to give new evidence on the hearing of an appeal he should give notice to the other side of his intention to apply to the court for leave to give such evidence (*Hastie v. Hastie*, 45 L. J. Ch. 288). Affidavits, which are intended to be used on appeal, should be filed with the officer of the division of the High Court from which the appeal comes (*Watts v. Watts*, 45 L. J. Ch. 658).

If, upon the hearing of an appeal, a question arise as to the ruling or direction of the judge to a jury or assessors, the court will have regard to verified notes or other evidence, and to such other materials as the court may deem expedient (O. 58, r. 13).

The Court of Appeal has power to give any judgment and Judgment make any order which ought to have been made, and to and powers make such further or other order as the case may require, of Court of Appeal. and this though the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision (O. 58, r. 5). No interlocutory order or rule from which there has been no appeal operates so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may seem just (O. 58, r. 14: *White v. Witt*, 46 L. J. Ch. 560).

The Court of Appeal has all the powers and duties as to amendment and otherwise of the Court of First Instance (O. 58, r. 5); and has power to make such order as to the whole or any part of the costs of the appeal as may seem just (O. 58, r. 5). As a general rule, the party succeeding

(a) Before the Judicature Acts, where a defence arose after judgment, the remedy was by writ of *audita querela*. But the court in which the judgment was obtained would in general give a summary relief on motion.

(b) See *Re The Coal Economising Gas Co., Ex parte Gover*, 45 L. J. Ch. 83.

PART VII. on an appeal gets his costs. This was not so under the old practice, nor is it so where the appeal was pending when the Judicature Acts took effect (*Olivant v. Wright*, 45 L. J. Ch. 1 ; *Ex parte Masters*, 45 L. J. B. 18) ; and by O. 58, r. 18.

How appli- Every application to a judge of the Court of Appeal must  
cation to be by motion, and the provisions of Order 53, noticed *ante*,  
Court of Appeal  
made. Chap. XI., apply thereto.

## CHAPTER XXVIII.

## APPEAL TO HOUSE OF LORDS.

**SUBJECT** as in the Judicature Acts mentioned, an appeal lies from any order or judgment of Her Majesty's Court of Appeal to the House of Lords, which is the final court of appeal.

For the purpose of aiding the House of Lords in the hearing and determination of appeals, Her Majesty, by virtue of the Judicature Act, 1876, appoints two Lords of Appeal in Ordinary. These Lords of Appeal hold their offices during good behaviour, but they may be removed therefrom on the address of both houses of parliament. Every Lord of Appeal in Ordinary, unless he is otherwise entitled to sit as a member of the House of Lords, is by virtue and according to the date of his appointment entitled during his life to rank as a baron by such style as Her Majesty may be pleased to appoint, and during the time that he continues in his office as a Lord of Appeal in Ordinary, and no longer, he is entitled to a writ of summons to attend, and to sit and vote in the House of Lords; his dignity as a lord of parliament does not descend to his heirs (J. A. 1876, s. 6).

By the Judicature Act, 1876, an appeal is not to be heard and determined by the House of Lords unless there are present not less than three of the following persons in this Act designated Lords of Appeal, *i.e.*,

1. The Lord Chancellor of Great Britain for the time being.

2. The Lords of Appeal in Ordinary.

3. Such peers of parliament as are for the time being holding or have held any of the following offices, *i.e.*, the office of Lord Chancellor of Great Britain or Ireland, or of paid Judge of the Judicial Committee of the Privy Council, or of Judge of one of Her Majesty's superior courts of Great Britain and Ireland (*a*).

(*a*) "Superior Courts of Great Britain and Ireland" means and includes,—As to England, Her Majesty's High Court of Justice and Her Majesty's Court of Appeal, and the Superior Courts of Law and Equity in England as they existed before the constitution of Her Majesty's High Court of Justice; and as to Ireland, the Superior Courts of Law and Equity at Dublin; and, as to Scotland, the Court of Session.

Lords of  
Appeal in  
Ordinary.

Three  
Lords of  
Appeal  
must be  
present.

PART VII. These provisions as to the appointments of Lords of Appeal in Ordinary for the purpose of aiding in the hearing and determination of appeals are new, and so are the provisions as to certain persons being present on the hearing and determining of appeals.

Sitting  
during  
proroga-  
tion, &c.

By s. 8 of the Judicature Act, 1876, for preventing delay in the administration of justice, the House of Lords may sit and act for the purpose of hearing and determining appeals during any prorogation of Parliament, at such time and in such manner as may be appointed by order of the House of Lords made during the preceding session of parliament; and all orders and proceedings of the said House in relation to appeals and matters connected therewith during such prorogation, shall be as valid as if parliament had been then sitting.

On the occasion of a dissolution of Parliament, Her Majesty may authorize the Lords of Appeal in the name of the House of Lords to hear and determine appeals during the dissolution of Parliament, and for that purpose to sit in the House of Lords at such times as may be thought expedient.

Former  
mode of  
proceeding.

Before the C. L. P. Act, 1852, error lay from the superior courts of Common Law to the Exchequer Chamber, and from thence to the House of Lords (11 G. 4 & 1 W. 4, c. 70, s. 8). Before the C. L. P. Act, 1852, the writ of error for reversing a judgment of the Exchequer Chamber was directed to the chief justice or chief baron of the court in which the original judgment was given, and where the record remained, and was made returnable before the Queen in her present parliament, if the parliament were then sitting, or, after a prorogation, before the Queen in her parliament at the next session, or, after a dissolution, before the Queen in her next parliament. See 2 Sellon, 395; 1 Vent. 81, 266; 1 Mod. 106. The C. L. P. Act, 1852, s. 148, abolished the writ of error in most cases and substituted another mode of proceeding in lieu thereof.

Present  
mode.

Error (a) does not now lie to the House of Lords. Every appeal is to be brought by way of petition to the House of Lords, subject to certain conditions as to matters of practice and procedure, &c., imposed by orders of the House of Lords (J. A. 1876, ss. 4 & 11). There is a provision in the Act that errors and appeals pending at the time of the commencement of it are not to be affected by it (s. 13).

Certain standing orders of the House of Lords have been

(a) By s. 25 of this Act, error includes a writ of error or any proceedings in or by way of error.

made which are applicable to all appeals presented to the house after the 1st day of November, 1876. The following is the form of the petition and appeal given by these orders:—

To the Right Honourable the Lords Spiritual and Temporal in Parliament assembled.

The humble petition and appeal of A.

Your petitioner humbly prays that the matter of the order (or orders or judgment or interlocutor) set forth in the schedule hereto (a), (or, so far as therein stated to be appealed against), may be reviewed before Her Majesty the Queen in her court of Parliament, and that the said order (or, so far as aforesaid) may be reversed, varied, or altered, or that the petitioner may have such other relief (if specific relief be desired, it can be so stated in the prayer), in the premises as to Her Majesty the Queen, in her court of Parliament may seem meet; and that (here name the respondents) may be required to lodge such printed cases as they may be advised, and the circumstances of the cause may require, in answer to this appeal, and that service of such order on the solicitors in the cause of the said respondents may be deemed good service.

*[To be signed by two counsel.*

*(Here insert Schedule).*

#### FORM OF SCHEDULE.

“From Her Majesty’s Court of Appeal (England).

“In a certain cause (or matter) wherein A. was plaintiff and B. was defendant.

“The order appealed from is in the words following, viz. (set forth order complained of), or, the order referred to in the above prayer is in the words following, the portion appealed from being printed in italics (set forth order, the portion complained of being printed in italics”).

We humbly conceive this to be a proper case to be heard before your lordships by way of appeal.

*[To be signed by two counsel.*

I, \_\_\_\_\_, clerk to Messrs. \_\_\_\_\_, of \_\_\_\_\_, solicitors for the appellants within-named, hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, I served Messrs. \_\_\_\_\_, of \_\_\_\_\_, solicitors for \_\_\_\_\_, the within-named respondents, with a correct copy of the foregoing

(a) The schedule must set out the title of the parties to the cause or matter, and the decrees, orders, judgments, or interlocutors appealed against; and where the appeal is not against the whole decree, the part appealed against must be defined.





a bond for £200, or pay £200 to the account of the fee fund of the house, which bond or sum is to be subject to the order of the house with regard to the costs of the appeal. CHAP.  
XXVIII.

By S. O. 5, r. 1, the printed cases and appendix must be lodged in the parliament office within six weeks from the date of the presentation of the appeal; and this Order states when the appeal should be set down for hearing: on default by the appellant the appeal to stand dismissed. (As to cross appeals see S. O. 6). There is no penalty on respondents who do not lodge their printed cases in the above time; but they can only appear at the bar on a printed case. An appellant on petition to the House of Lords stating a sufficient cause, may get further time to lodge his cases, &c. In appeals in which the parties are able to agree in their statement of the subject-matter, it is optional to lodge a joint case with reasons *pro* and *con*. The printed cases must be signed by one or more counsel, who have attended as counsel in the court below, or purpose attending as counsel at the hearing in the house (S. O. 5, r. 3). Many other directions are given by the Standing Orders as to the mode of printing the cases, the size of the same, &c.

A respondent who has lodged his printed cases may set down the cause for hearing on the first sitting day after the expiration of the time limited by the Standing Order for lodging printed cases.

By S. O. 8, supplemental cases are to be delivered where appeals are revived on the death of parties, or where parties are added by leave of the house.

S. O. 7 contains a provision for cases where the time for doing certain acts under the Orders expires during the recess of the house.

S. O. 10 states how costs ordered to be paid by the house are to be taxed.

recognisance are to be executed before a commissioner appointed to administer oaths in the supreme court.

## CHAPTER 'XXIX.

## APPEALS FROM INFERIOR COURTS—REMOVING PROCEEDINGS THEREFROM.

PART VII. By Judicature Act, 1873, s. 45, all appeals from petty or quarter sessions, from a county court (*a*), or from any other inferior court, which might, before the passing of this Act, have been brought to any court or judge, whose jurisdiction is by this Act transferred to the High Court of Justice, may be heard and determined by Divisional Courts of the High Court of Justice. The appeal from the Lord Mayor's Court, London, lies to the Court of Appeal, and not to a divisional court under this section (*Le Blanche v. Reuter's Telegram Co.*, L. R. 1 Ex. 408). Every judge of the High Court is a judge to hear and determine appeals under this section (R. 11, 7 November, 1876). A divisional court for this purpose consists of two judges, selected for a year. Any other judge of the High Court of Justice may, by arrangement between himself and any one of the judges so selected, act for him in any particular case, or on any particular day (R. 16, 1 December, 1875).

The selected judges make such arrangements as they think fit, as to the manner in which applications may be made to them, in court or chambers, under the 6th section of 38 & 39 Vict., c. 50, relative to appeals by motion under that Act (*b*).

(*a*) Appeals from County Courts are given by 13 & 14 Vict. c. 61; see 19 & 20 Vict. c. 108, s. 68; 28 & 29 Vict. c. 99, s. 18; 31 & 32 Vict. c. 71, s. 26; and 38 & 39 Vict. c. 50, s. 6, *infra*. See *The Two Brothers*, 45 L. J. Prob. 47, which was a case within the Admiralty jurisdiction of the County Court. By Judicature Act, 1875, s. 15, her Majesty, from time to time, may, by Order in Council, direct that the enactments relating to appeals from county courts shall apply to any other inferior court of record; and those enactments, subject to any exceptions, conditions, and limitations contained in the Order, will apply accordingly, as from the date mentioned in the Order.

(*b*) By 38 & 39 Vict. c. 50, The County Courts Act, 1875, s. 6, in any cause, suit, or proceeding, other than a proceeding in bankruptcy, tried or heard in any county court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction, or decision of the judge, at any time within eight days after the same shall have been made or given, to appeal against such

All appeals from inferior courts under the above section (except admiralty appeals from inferior courts, which, until further order, are to be assigned to the present judge of the Admiralty Court), are to be entered in one list by the officers of the Crown Office of the Queen's Bench Division; and are to be heard by such divisional court of the Queen's Bench, Common Pleas, or Exchequer Division, as the presidents of those divisions shall from time to time direct. Nothing in this Order affects the validity of any rule or regulation theretofore issued with reference to such appeals by the divisional court formed under the said section (R. 11, 7 November, 1876).

CHAP.  
XXIX.

The determination of an appeal by such divisional court is final. But, except in cases where the determination is made final by statute, special leave to appeal to the Court of Appeal may be given by the Divisional Court which heard the appeal (J. A. 1873, s. 45).

By Judicature Act, 1873, some of the provisions in the Judicature Acts apply to certain courts of civil jurisdiction. And by s. 90, where in any proceedings before any such inferior court, any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the court, such defence or counter-claim does not affect the competence or the duty of the court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the court has jurisdiction to administer, can be given to the defendant upon any such counter-claim. In such case

Removing  
proceeding  
from  
inferior  
courts.

ruling, order, direction, or decision, by motion to the court to which such appeal lies, instead of by special case, such motion to be *ex parte* in the first instance, and to be granted on such terms as to costs, security, or stay of proceedings as to the court to which such motion shall be made shall seem fit. And if the court to which such appeal lies be not then sitting, such motion may be made before any judge of a superior court sitting in chambers. And at the trial or hearing of any such cause, suit, or proceeding, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause, suit, or proceeding, and he shall, at the expense of any person or persons, being party or parties in any such cause, suit, or proceeding, requiring the same for the purpose of appeal, furnish a copy of such note, or allow a copy to be taken of the same by or on behalf of such person or persons, and he shall sign such copy, and the copy so signed shall be used and received on such motion and at the hearing of such appeal. This enactment gives no right to appeal from a county court on a question of fact: *Cousens v. London Deposit Bank*, 45 L. J. Ap. D. Ct. 573, et per Field, J.. "The appeal from the equitable side of the County Courts is given by 28 & 29 V. c. 99, and this judgment must not be taken as settling anything more than the present case."

PART VII. the High Court, or any division or judge thereof, may, if thought fit, on the application of any party to the proceeding, order that the whole proceedings be transferred from such inferior court to the High Court or to any division thereof; and in such case the record must be transmitted by the registrar, or other proper officer, of the inferior court to the High Court, and the proceedings are thenceforth continued and prosecuted in the High Court as if they had been originally commenced therein.

### PROCEEDINGS IN PARTICULAR ACTIONS.

## CHAPTER XXX.

BEFORE the Judicature Acts an action for the recovery of the possession of land was called an action of ejectment, and previous to the Common Law Procedure Act, 1852, this action was a strange and anomalous proceeding, which was first introduced in the reign of Edward IV. It was, before the last-mentioned statute, commenced by delivering to the person in possession of the land sought to be recovered, a document purporting to be a declaration in an action of trespass and ejectment, alleged to have been previously commenced in one of the superior courts of law at the suit of a fictitious person, generally called John Doe, against another fictitious person, generally called Richard Roe, and who was styled the casual ejector. The real plaintiff, in whom the title was, was called the lessor of the plaintiff. The following form of such declaration in the King's Bench on a supposed original writ is taken from Tidd's Forms, and is set out here in order that the former mode of proceeding may be better understood.

In the King's Bench (or Common Pleas),  
term, in the            year of the reign of King George the 4th.

Middlesex (to wit). Richard Roe, late of \_\_\_\_\_, yeoman, was attached to answer John Doe, of a plea wherefore the said Richard Roe, with force and arms, &c., entered into messuages, barns, stables, outhouses, yards, gardens, orchards, acres of arable land, acres of meadow land, and acres of pasture land, with the appurtenances, situate and being in the parish of \_\_\_\_\_, in the county of \_\_\_\_\_, which A. B. had demised

(a) See 37 & 38 Vict. c. 57, an Act for further limiting the times within which actions may be brought for the recovery of land. This Act does not come into operation until the 1st day of January, 1879.

PART VIII. to the said John Doe, for a term which is not yet expired, and ejected him from his said farm; and other wrongs to the said John Doe there did, to the great damage of the said John Doe, and against the peace of our lord the now king, &c. And thereupon the said John Doe, by \_\_\_\_\_, his attorney, complains; that whereas the said A. B., on the \_\_\_\_\_ day of \_\_\_\_\_, in the \_\_\_\_\_ year of the reign of our said lord the king, at the parish aforesaid, in the county aforesaid, had demised the said tenements, with the appurtenances, to the said John Doe; to have and to hold the same to the said John Doe and his assigns, from the day of \_\_\_\_\_ then last past, for and during and unto the full end and term of \_\_\_\_\_ years from thence next ensuing, and fully to be complete and ended. By virtue of which said demise, the said John Doe entered into the said tenements with the appurtenances, and became and was thereof possessed, for the said term so to him thereof granted. And the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, in the \_\_\_\_\_ year aforesaid, with force and arms, &c., entered into the said tenements with the appurtenances, which the said A. B. had demised to the said John Doe, in manner and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm; and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of our said lord the now king: Wherefore the said John Doe saith that he is injured, and hath sustained damage to the value of \_\_\_\_\_ l. and therefore he brings his suit, &c.

Mr. C. D. [the tenant in actual possession],

I am informed that you are in possession of, or claim title to the premises, in this declaration of ejectment mentioned, or some part thereof; and I, being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear in next \_\_\_\_\_ term (or in London or Middlesex, "on the first day of next \_\_\_\_\_ term"), in his Majesty's court of King's Bench, wheresoever his said Majesty shall then be in England, (or in the Common Pleas, "in his Majesty's court of Common Bench at Westminster,") by some attorney of that court; and then and there, by rule of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession.

Yours, &c.,

RICHARD ROE.

This declaration, with the notice, was, in general, served CH. XXX. upon the tenant in possession of the property sought to be recovered, or upon his wife, though in some cases other modes of service were deemed sufficient. The tenant in possession, or other person entitled to defend the possession, might make himself defendant to the action instead of the nominal defendant Richard Roe; but this was only allowed upon certain terms imposed and ordered by the court; and such terms were imposed that the question whether the lessor of the plaintiff, *i.e.* the real plaintiff, was entitled to recover possession was tried. If no one came in to defend the action instead of Richard Roe, within a certain prescribed time, judgment was signed by default and execution issued for recovery of possession. For the history and mode of proceeding in this action see the treatises on this subject of Gilbert, Runnington and Adams, and Tidd's Practice. It is strange that this indirect and roundabout mode of proceeding should have existed for so long a time. It was altered by the Common Law Procedure Act, 1852, ss. 168—221.

And now, by the Judicature Acts, an action for the recovery of land is commenced by a writ of summons issued as mentioned *ante*, p. 57, and the proceedings, except as here noticed, are generally the same as in ordinary actions. The person who has the right to recover the possession should be the plaintiff, (a) and the tenant in possession of the land sought to be recovered should be made defendant. The following is the form of the indorsement on the writ given by the Act:—The plaintiff's claim is to recover possession of a house, No.       , in        street, or of a farm called Black-acre, situate in the parish of       , in the county of       . Present mode of proceeding.

By O. 17, r. 2, no cause of action can, unless by leave of the court or a judge (*Whetstone v. Dewis*, 45 L. J. Ch. 49; L. R. 1 Ch. 99), be joined with an action for the recovery of land, (b) except claims in respect of mesne profits or arrears of rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held. Leave was granted to join with an action for the recovery of land a claim for the delivery up of the deed under which the defendant claimed (*Cook v. Enchmarch*, 45 L. J. Ch. 504; L. R. 2 Ch. 111).

The service should, if practicable, be made upon the defendant personally. As to the court or judge making an order for substituted or other service, see *ante*, p. 64: see *Chit. Arch.* by Prentice, 12 ed. p. 1023. The writ may be Service of writ.

(a) When a mortgagor may sue, see *ante*, p. 29.

(b) See *Tawell v. The Slate Co.*, L. R. 3 Ch. 629.

PART VIII. served out of the jurisdiction. Service may, in case of vacant possession, when it cannot otherwise be effected, be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property (O. 9, r. 8).

By Common Law Procedure Act, 1852, s. 209, the tenant, when served with a copy of the writ, or to whose knowledge it comes, must forthwith give notice thereof to his landlord or his bailiff or receiver, under certain penalties.

Appear-  
ance.

The defendant may appear as required by the writ, and any person not named as a defendant therein may by leave of the court or judge appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant (O. 12, r. 18). And in such case he (the landlord) must enter an appearance as in ordinary cases, entitling it in the action against the party or parties named in the writ as defendant or defendants, and stating in his appearance that he appears as landlord (O. 12, r. 19); and he must forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person. In all subsequent proceedings the landlord is named as a party defendant to the action (O. 12, r. 19, 20).

Any person appearing is at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance, or in a notice intituled in the cause, and signed by him or his solicitor; such notice must be served within four days after appearance; an appearance where the defence is not so limited is deemed an appearance to defend for the whole (O. 12, r. 21). The above notice may be in the Form No. 7, in Part I. of Appendix (A.), with such variations as circumstances may require (O. 12, r. 22). The defendant should take care and limit his defence to that part of the property for which he intends to defend, when he does not wish to defend for the whole; otherwise he may be made liable for the costs of the action, although he succeed as to that part of the property which he really claims or intended to defend for.

As to the course to be pursued where the plaintiff and tenant in possession are tenants in common, &c., see C. L. P. Act, 1852, s. 188.

Judgment  
in default  
of appear-  
ance.

If no appearance be entered in due time, or if an appearance be entered but the defence be limited to part only, the plaintiff is at liberty to enter a judgment that the person whose title is asserted in the writ recover possession of the land, or of the part thereof to which the defence does not



apply (O. 13, r. 7). By O. 13, r. 8, where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, upon the writ, he may enter judgment as in the last preceding rule mentioned for the land; and may proceed as in the other preceding rules of this order as to such other claim so indorsed. These rules are referred to *ante*, p. 92, *et seq.* CH. XXX.

Before the Judicature Acts there were no pleadings in an action of ejectment. But since those Acts, in an action for the recovery of the possession of land, there are pleadings as in other actions. When an appearance has been entered the plaintiff can deliver his statement of claim. A form of a statement of claim will be found in Appendix (C.), No. 25. We have already seen, *ante*, p. 201, what causes of action can be joined in this action. Pleadings.

A form of statement of defence will be found in Appendix (C.), No. 25. No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it is sufficient to state by way of defence that he is so in possession. And he may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned (O. 19, r. 15).

If the defendant makes default in delivering his defence or demurrer within the time allowed for that purpose, the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons recover possession of the land, with his costs (O. 29, r. 7). And where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, upon the writ, if the defendant makes default as above, or if there be more than one defendant, some or one of the defendants make such default, the plaintiff may enter judgment against the defaulting defendant or defendants, and proceed as mentioned in Rules 4 and 5, noticed *ante*, p. 95 (O. 29, r. 8).

If there is any uncertainty as to what property the action is brought for, a judge will order better particulars of same to be given; and so if there be any doubt in respect of what property the defendant defends for, further particulars of same may be ordered. Incidental proceedings.  
Obtaining particulars of land.

If a person bring an action for the recovery of land after he has been unsuccessful in a prior action for the same, a judge may, after the defendant has appeared, order the

## PART VIII.

Security  
for costs  
where  
second  
action  
brought.

Confessing  
action.

Proceed-  
ings to  
trial.

Trial.

plaintiff to give security for the payment of the defendant's costs, and that all further proceedings in the action be stayed until such security be given; and such an order will be made when the first action was brought by any person through or under whom the plaintiff claims against the same defendant, or against any person through or under whom he defends (C. L. P. Act, 1854, s. 93).

As to confessing an action of ejectment before the Judicature Acts, see C. L. P. Act, 1852, ss. 203—205.

The proceedings to trial and the trial are the same for the most part as in ordinary cases. A person defending as landlord cannot set up as a defence any defence which the tenant could not set up. If the title of the plaintiff be shown to have existed at the time the writ issued, and at the time of the service thereof, but if it also appears to have expired before trial, the plaintiff, it seems, is entitled to a verdict according to the facts and to a judgment for his costs of suit (C. L. P. Act, 1852, s. 181). Sect. 189 of this Act points out the course to be pursued where the plaintiff and defendant are found to be tenants in common, &c.; where there is any claim for mesne profits, &c., damages in respect of same must be assessed.

If the plaintiff appears at the trial and the defendant does not, the former is entitled to recover without any proof of his title; at least this was so before the Judicature Acts, and it is presumed is so now. (See O. 36, r. 18, *ante*, p. 135.) If the defendant appears and the plaintiff does not, the former is entitled to judgment dismissing the action (C. L. P. Act, 1852, s. 183; *ante*, p. 135).

Execution.

A judgment that a party do recover possession of any land may be enforced by writ of possession in manner heretofore used in actions of ejectment in the superior courts of common law (O. 48, r. 1; O. 42, r. 3), that is to say, by writ of *habere facias possessionem*; (a) which is a writ directed to the sheriff, requiring him to deliver possession of the premises to the party who has obtained the judgment. This writ may also direct the sheriff to levy the costs recovered, or a separate writ may be issued for such costs.

By O. 48, r. 2, where by any judgment any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due service of such judgment and that the same has not been obeyed.

(a) See Form of Writ, App. (F.) No. 7.

In some cases a person who has been defending the action in the name of another may be ordered to pay the costs of the plaintiff where he has obtained a verdict. Thus, if a landlord defend an action in the name of a pauper tenant, and the plaintiff obtain a verdict, the court may order the landlord to pay the plaintiff his costs of the action.

CH. XXX.

Ordering  
third  
party to  
pay costs.

There are some peculiarities in an action by a landlord for the recovery of possession of land for forfeiture by non-payment of rent, when a demand of the same is necessary in order to create a forfeiture. Proceedings at common law are seldom taken in such a case, on account of the great nicety that is required in making the demand both as to the amount demanded and as to the time of making it. By the C. L. P. Act, 1852, ss. 210—212, where a landlord has a right reserved to him of re-entry for non-payment of rent, and there is half a year's rent in arrear, and no sufficient distress on the premises countervailing the arrears of rent, the landlord may bring an action for the recovery of the demised property, without making any re-entry or demand for payment of the rent. If the writ cannot be legally served, or no person be in actual possession of the premises, the service may be effected by affixing a copy of the writ upon the door of the demised messuage, if there be one, or, if there be not one, upon some notorious place upon the premises. If the tenant does not appear and defend, judgment may be signed by default as in ordinary cases, on an affidavit being made stating that half a year's rent was due before the writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears of rent then due, and that the plaintiff had power to re-enter. At the trial the plaintiff has to prove, in addition to the other necessary facts, that half a year's rent was due before the writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears of rent then due, and that the plaintiff had power to re-enter.

Action for  
forfeiture  
by non-  
payment of  
rent (a).

By the C. L. P. Act, 1852, s. 212, if the rent and costs be tendered or paid by the tenant or his assignee, as mentioned in that section, at any time before trial, all proceedings in the action are to cease, and, if afterwards he be relieved in equity, he holds the land demised, according to the lease, without any new lease.

By the C. L. P. Act, 1860, ss. 1—11, in the case of an

(a) As to the assignee of the reversion giving a notice of the assignment to the lessee before bringing an action for such a forfeiture, see *Scallock v. Harston*, 45 L. J. Q. B. 125.

PART VIII. ejectment for a forfeiture for non-payment of rent, the court or a judge has power, within six calendar months after the execution of an *hab. fa. poss.* (a), upon rule or summons, to give relief in a summary manner, subject to an appeal to the Court of Appeal, and subject to the same terms and conditions as to payment of rent, costs, and otherwise, as in the Court of Chancery before the Judicature Acts (b); and if the lessee, his executors, administrators, or assigns, upon such proceedings be relieved, he holds the demised lands according to the lease, without any new lease. Where such relief is granted, the court or a judge directs a minute thereof to be made by indorsement on the lease or otherwise. An order made by a judge under the provisions of this Act is subject to an appeal to the court. No appeal to the Court of Appeal is allowed unless notice thereof be given in writing to the opposite party, or his solicitor, and to one of the masters of the court, within four days after the decision complained of, or such further time as may be allowed by

(a) See 4 Geo. 2, c. 28, s. 23.

(b) By the Common Law Procedure Act, 1852, s. 210, in case the lessee or his assignee, or other person claiming or deriving under the said lease, suffers judgment to be recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six calendar months, after such execution executed, then the said lessee, &c., are barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, in case the same be erroneous, and the said landlord or lessor, from thenceforth holds the said demised premises discharged from such lease; and if on such ejectment a verdict pass for the defendant, or the claimant shall be non-suited therein, then the defendant recovers his costs. There is a proviso in this section as to the rights of the mortgagee, if any, of the lease.

By s. 211, "In case the said lessee, his assignee, or other person claiming any right, title, or interest in law or equity, of, in, or to the said lease, within the time aforesaid, proceed for relief in any court of equity, such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does, within forty days next after a full and perfect answer is made by the claimant in such ejectment, bring into court, and lodge with the proper officer, such money as the lessor or landlord in his answer swears to be due and in arrear over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the court; and if such proceedings for relief in equity be taken within the time aforesaid, and after execution is executed, the lessor or landlord is accountable only for so much as he really and *bonâ fide*, without fraud, deceit, or wilful neglect, makes of the demised premises from the time of his entering into the actual possession thereof; and if what is so made be less than the rent reserved on the lease, the said lessee or his assignee, before he can be restored to his possession, must pay such lessor or landlord what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the said lands."

the court or a judge. Notice of appeal is a stay of execution, provided bail be duly given. The appeal is upon a case stated by the parties, or, if they cannot agree as to the form of it, it is settled by the court or by a judge thereof. The case sets forth so much of the pleadings, facts, and the order, rule, or judgment objected to as is necessary to raise the question for the decision of the Court of Appeal. The Court of Appeal gives such judgment, or makes such rule as ought to have been given or made in the court below, and may remit the cause, with directions; and all such further proceedings may be taken thereupon as if the judgment or rule had been given or made by the court below. The Court of Appeal has power to adjudge payment of costs, and to order restitution.

The proceedings in an action for recovery of land for a forfeiture for breach of a covenant to insure against loss or damage by fire, are the same as in ordinary cases. But the court or judge has power, subject to an appeal to the Court of Appeal, upon rule or summons, to give relief in a summary manner in all cases in which, before the Judicature Acts, relief might be obtained in the Court of Chancery under the provisions of the 22 & 23 Vict. c. 35, and upon such terms as would be imposed in such court (C. L. P. Act, 1860, s. 2). The court or judge directs a minute of the relief to be made by indorsement on the lease or otherwise. The mode of appeal is the same as mentioned, *ante*, p. 206, where relief is granted against forfeiture for non-payment of rent.

Action for  
forfeiture  
for breach  
of covenant  
to insure.

By 22 & 23 Vict. c. 35, s. 4, "A court of equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened (see *Austin v. Drewe*, 4 Taunt. 436), and the breach has, in the opinion of the court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the court in conformity with the covenant to insure (*Penniall v. Harbottle*, 11 Q. B. 368: *Havens v. Middleton*, 10 Hare, 641) upon such terms as to the court may seem fit."

By s. 5, "The court, where relief shall be granted, shall direct a record of such relief having been granted to be made by indorsement on the lease or otherwise."

By s. 6, "The court shall not have power under this Act to relieve the same person more than once in respect of the same covenant or condition; nor shall it have power to grant any relief under this Act where a forfeiture under the covenant in respect of which relief is sought, shall have

PART VIII. been already waived out of court in favour of the person seeking the relief" (*Mills v. Griffiths*, 45 L. J. Q. B. 771).

By s. 7, "The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance relating to the building covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant."

By s. 8, "Where, on a *bond fide* purchase, after the passing of this Act [13 Aug. 1859], of a leasehold interest under a lease containing a covenant on the part of the lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent (*Doe d. Nash v. Bird*, 1 M. & W. 408), for the last payment of rent accrued due before the completion of the purchase, and there is subsisting at the time of the completion of the purchase an insurance in conformity with the covenant, the purchaser, or any person claiming under him, shall not be subject to any liability by way of forfeiture or damages, or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase, of which the purchaser had not notice before the completion of the purchase; but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant."

By s. 9, "The preceding provisions shall be applicable to leases for a term of years absolute, or determinable on a life or lives, or otherwise, and also to a lease for the life of the lessee, or the life or lives of any other person or persons."

Before this Act a court of equity would not have granted relief against a forfeiture incurred on this account, as it was considered that no adequate compensation could be made to the lessor (*Reynolds v. Pitt*, 19 Ves. 134; *Gregory v. Williams*, 9 Hare, 683).

Where  
action  
brought on  
termination  
of tenancy,  
&c.

The Common Law Procedure Act, 1852 (ss. 213—216), contains provisions which apply to a case where an action is brought by a landlord upon the termination of a tenancy to recover the property demised. Under this enactment, the tenant is, under certain circumstances, required to find bail.

The Common Law Procedure Act, 1852, s. 217, provides

for a case where the landlord's right of entry accrued or tenancy expired in or after Hilary or Trinity Term. CH. XXX.  
This enactment is not now of much practical utility.

Landlords' other rights and remedies are not affected by the provisions in the Common Law Procedure Act, 1852, except where stated to be so in the Act (s. 218).

If no claim for mesne profits has been joined in the action for the recovery of the land, the plaintiff may, after judgment obtained in such action, bring an action against the defendant for the damages the former has sustained by the latter wrongfully keeping the possession of the land. This is called an action for mesne profits. If the defendant in his statement of defence raise any point decided in the action for the recovery of the land, the plaintiff may reply by way of estoppel the judgment in such action (*Harris v. Mulkern*, 45 L. J. Ex. 244). Action  
for mesne  
profits.

## CHAPTER XXXI.

## REPLEVIN.

PART VIII. Replevin is a re-delivery by the registrar of the county court, to the owner, of his chattels taken, upon his giving security to the distrainer, amongst other things, to commence an action of replevin within a certain time, to prosecute the same with effect and without delay, and to make a return of the goods if a return be adjudged. Replevin is a remedy usually adopted where goods are wrongfully distrained for rent or damage feasant. It is a remedy, however, which may be almost always resorted to by a party whose chattels are unlawfully taken from him (*Mennie v. Blake*, 6 E. & B. 842; 25 L. J. Q. B. 399); but in some cases replevin will not lie, as where the taking was in execution under a judgment of a superior court, &c. (*George v. Chambers*, 11 M. & W. 149).

The mode of granting replevins was materially altered by the first of the new County Courts Acts, 9 & 10 Vict. c. 95, ss. 119, 120; and this Act and the 19 & 20 Vict. c. 108, ss. 63—71, the Common Law Procedure Act, 1860, ss. 22 to 24, (a) and the Judicature Acts regulate the present mode

(a) By the 19 & 20 Vict. c. 108, s. 63, "The powers and responsibilities of the sheriff with respect to replevin bonds and replevins shall henceforth cease, and the registrar of the county court of the district in which any distress subject to replevin shall be taken shall be empowered, subject to the regulations hereinafter contained, to approve of replevin bonds, and to grant replevins, and to issue all necessary process in relation thereto, and such process shall be executed by the high bailiff."

By sect. 64, "Such registrars shall, at the instance of the party whose goods shall have been distrained, cause the same to be replevied to such party, on his giving one or other of such securities as are mentioned in the next two succeeding sections."

By sect 65, "An action of replevin may be commenced in any superior court in the form applicable to personal actions therein, and such court shall have power to hear and determine the same; and if the replevisor shall wish to commence proceedings in any superior court, he shall, at the time of the replevying, give security, to be approved of by the registrar, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the cause in a superior



of procedure. In this chapter we propose to make a few Ch. XXXI. remarks as to the mode of proceeding in replevin where goods are taken as a distress for rent or damage feasant; but they for the most part apply to all cases of replevin (C. L. P. Act, 1860, s. 22, *infra*, n.).

court, conditioned to commence an action of replevin against the distrainer in such superior court as shall be named in the security, within one week from the date thereof, and to prosecute such action with effect and without delay, and unless judgment thereon be obtained by default, to prove before such superior court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that such rent or damage exceeded 20*l.*, and to make return of the goods, if a return thereof shall be adjudged."

By sect. 66, "If the replevisor shall wish to commence proceedings in a county court, he shall at the time of replevying give security, to be approved of by the registrar, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the cause in the county court, conditioned to commence an action of replevin against the distrainer in the county court of the district in which the distress shall have been taken, within one month from the date of the security, and to prosecute such action with effect and without delay, and to make return of the goods, if a return thereof shall be adjudged."

By sect. 67, "Any action of replevin brought in a county court shall be removed into any superior court by writ of *certiorari*, if the defendant shall apply to such superior court, or to a judge there for such writ, and shall give security, to be approved of by the master of such superior court, for such amount, not exceeding 150*l.*, as such master shall think fit, conditioned to defend such action with effect, and, unless the replevisor shall discontinue, or shall not prosecute such action, or become nonsuit therein, to prove before such superior court that the defendant had good ground for believing, either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that the rent or damage in respect of which the distress shall have been taken, exceeded 20*l.*; and every such superior court shall have power to determine the same action."

By sect. 68, an appeal from the decision of a county court is allowed in all actions of replevin, where the amount of rent or damage exceeds 20*l.*

By sect. 69, parties may agree not to appeal.

Sect. 70 directs how securities under this Act are to be given and enforced.

By sect. 71, where security is required to be given by the above Act, a deposit of money may be made in lieu thereof.

By the C. L. P. Act, 1860, s. 22, "The provisions of the 19 & 20 Vict. c. 108, which relate to replevin, shall be deemed and taken to apply to all cases of replevin, in like manner as to the cases of replevin of goods distrained for rent or damage feasant."

Sect. 23. The plaintiff in replevin may in answer to a *wovry* pay money into court in satisfaction in like manner and subject to the same proceedings as to costs and otherwise, as upon a payment into court by a defendant in other actions.

Sect. 24. Such payment into court in replevin, shall not, nor shall the acceptance thereof by the defendant in satisfaction, work a forfeiture of the replevin bond.

**PART VIII.** The registrar of the county court of the district in which the distress is taken, at the instance of the party whose goods are distrained, grants the replevin, approves of the replevin bonds, and issues all necessary process in relation thereto, which is executed by the high bailiff of the county court. If the action is to be commenced in a superior court, the replevisor must, at the time of replevying, give security, to be approved of by the registrar, for such an amount as he thinks sufficient to cover the alleged rent or damage in respect of which the distress was made, and the probable costs of the action. The security is a bond with sureties to the distrainer, conditioned to commence the action within one week, and to prosecute the same with effect and without delay; and, unless judgment thereon be obtained by default, to prove before the court in which the action is brought that he, the replevisor, had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that such rent or damage exceeded 20*l.*, and to make return of the goods, if a return shall be adjudged. A deposit of money may be made instead of giving a bond. If the action of replevin is to be brought in a county court, the bond is conditioned differently.

An action of replevin may be brought in the High Court of Justice, or in a county court. If brought in the former, the replevisor must, unless judgment be obtained by default, prove before the High Court that he had good ground for believing either that the title to some corporeal or incorporeal hereditaments, or to some toll, market, fair, or franchise, was in question, or that the rent or damage in respect of which the distress was made exceeded 20*l.* (19 & 20 Vict. c. 108, s. 65).

The action, when brought in the High Court of Justice, is commenced by a writ of summons in the same way as an ordinary action. It must be commenced within one week from the date of the replevin bond and prosecuted without delay, or the bond will be forfeited. The proceedings in the action are for the most part the same as in ordinary cases. The defendant, by his statement of defence, may claim a return of the goods; so that both parties are regarded as actors or claimants (*a*). The plaintiff, if he succeeds, may

(*a*) Before the Judicature Acts, if the defendant contended that the goods were taken by him in his own right, his pleading was called an *avowry*—if in the right of another it was called a *cognisance*: the plaintiff's next pleading was called a *plea in bar*, and the defendant's pleading to such

recover damages for the unlawful taking of his goods. And CH. XXXJ. the defendant, if he succeed, has judgment for a return of the goods and costs ; or if the distress was for rent, he may have judgment for a return of the goods, or instead thereof, at his option, the jury may find the arrears of rent and the value of the goods distrained, and thereupon the defendant has judgment for such arrears, or so much thereof as the value of the goods amount to (17 C. 2, c. 7), and in either case he recovers full and reasonable indemnity for all costs and expenses incurred (11 Geo. 2, c. 19 ; 5 & 6 Vict. c. 96, s. 2).

An action of replevin may be brought in the county court for the district where the distress was taken. It must be brought within one month of the date of the security given on granting the replevin, and must be prosecuted with effect and without delay. It may, at the instance of the defendant, be removed into the High Court of Justice by a writ of *certiorari* by leave of the court or a judge, on giving security, to be approved of by the master, for such amount, not exceeding 150*l.*, as he shall think fit, conditioned to defend the action with effect, and (unless the plaintiff discontinue, or does not prosecute the action, or become nonsuit therein), to prove before the High Court that the defendant had good ground for believing, either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise was in question, or that the rent or damage in respect of which the distress was taken exceeded 20*l.* The security is a bond, with sureties, to the plaintiff ; or instead of a bond, a deposit of money may be made (19 & 20 Vict. c. 108, s. 71).

plea a replication. By 11 Geo. 2, c. 19, a general form of avowry or cognisance for rent is given. And by the Common Law Procedure Act, 1860, the plaintiff may in answer to an avowry pay money into court.

## CHAPTER XXXII.

## INTERPLEADER.

PART VIII. The 1 & 2 W. 4, c. 58, s. 1, recites that, "It often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a *suit in equity* against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expense and delay." At the time of the passing of the Judicature Acts, under this Act, and the Common Law Procedure Act, 1860, a certain procedure and practice was used in interpleader cases in the courts of common law; and by O. 1, r. 2, this procedure and practice is to apply to all actions and all the divisions of the High Court of Justice, and the application by a defendant is to be made after being served with a writ of summons and before delivering a defence.

The usual mode of proceeding in interpleader cases is for the defendant, after being served with the writ, and before delivering his defence, to apply to a judge (a) at chambers on summons, by which both the plaintiff and the claimant are called on to appear before the judge. The application should be supported by an affidavit showing that the defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to the claimant who has sued or is expected to sue for the same, and that the defendant does not collude with the claimant, but is ready to bring into court or to pay or dispose of the subject-matter of the action in such manner as the judge may order or direct. The judge on such application may order the claimant to state the nature and particulars of his claim, and maintain or relinquish the same. If the claimant does not appear before the judge, or if he appears but does not persist in his claim, an order will be made against him barring him from prosecuting his claim against the defendant; and the subject-matter of the dispute will be ordered to be delivered up to the plaintiff, and such other order will be made between the plaintiff and the defendant

(a) The court has jurisdiction to entertain the application; and the judge when the application is made to him may, if he think proper, refer the matter to the court.

as to costs and other matters as may be just and reasonable. If the claimant appears, and persists in his claim, an order will be made that he be made defendant in the action instead of the defendant, or that an action or issue be tried between the claimant and the plaintiff to decide the right, and that in the meantime the subject-matter in dispute be deposited in safe custody. By consent of the plaintiff and the claimant, their counsel, or solicitors, the judge may dispose of the merits of their claims, and determine the same in a summary manner, and make such other rules and orders therein as to costs, and all other matters, as may appear to be just and reasonable. In trifling cases, at the request of either party, the judge may decide the matters in dispute in a summary way (*Dodds v. Shepherd*, 45 L. J. Ex. 457); and where the question is one of law, and the facts are not in dispute, the judge, in his discretion, may decide the question, or order a special case to be stated for the opinion of the court (Common Law Procedure Act, 1860, ss. 14—17).

When a feigned issue is directed it is tried much in the same way as an ordinary action is tried. The judgment in any action or issue is final and conclusive against the parties, and all persons claiming by, from, or under them. After the trial, a judge at chambers makes such further order as may be necessary, and the unsuccessful party is in general ordered to pay the costs; but the judge exercises a discretion as to this, and if the claimant only succeeds as to a trifling part of his claim, he may lose his costs, though successful on the trial of the issue, and may be even ordered to pay costs.

All rules, orders, matters, and decisions on interpleader proceedings may be entered of record (1 & 2 W. 4, c. 58, s. 7; Common Law Procedure Act, 1860, s. 18).

An appeal will lie to the Court of Appeal from a judgment on the trial of an interpleader issue (*Witt v. Parker*, 46 L. J. Q. B. 450).

By 1 & 2 W. 4, c. 58, s. 6 (amended by 1 & 2 Vict. c. 45, By sheriffs. s. 2, and the Common Law Procedure Act, 1860, ss. 12—18), protection and relief is given to sheriffs and other officers executing the process of the court where goods are taken in execution by them and are claimed by a third party. The sheriff, in order to get relief, proceeds much in the same way as a defendant in an action. The application for relief is in general made to a judge at chambers, and the summons calls on both the claimant and execution creditor to appear before the judge. If an issue be directed to be tried, the claimant is usually made the plaintiff, and the execution creditor the defendant.

## CHAPTER XXXIII.

PART VIII.ACTIONS BY AND AGAINST CORPORATIONS AND COMPANIES  
SUING IN NAME OF THEIR PUBLIC OFFICERS, &C.

- a. Corporations generally.*
- b. Companies registered under the Companies Act, 1862.*
- c. Railway and similar companies.*
- d. Companies suing in the name of their public officers.*

*a. Corporations generally.*

A CORPORATION aggregate sues and is sued in its corporate name, and it must sue or defend by solicitor. It may sue or be sued by one of its members or shareholders. As a general rule, only the property of the corporation is liable to satisfy a judgment obtained against the corporation, but, as will be presently shown, this is not always so. The proceedings, except as above, and in this work mentioned, are the same as in ordinary cases.

*b. Companies registered under the Companies Act, 1862.*

A company registered under "The Companies Act, 1862" (the 25 & 26 Vict. c. 89, amended by 30 & 31 Vict. c. 131), and to which this Act applies (*a*), sues and is sued in its corporate name, and except as here mentioned, in the same way as a corporation aggregate. A company, under this Act, may be formed with or without limited liability, and where a company is formed with limited liability the liability of the directors or managers of such company or the managing director may, if so provided by the memorandum of association, be unlimited. A company with limited liability, except in certain cases where the company is not established for the purposes of gain, has the word "limited" as the last word of its name, and where a company reduces its capital, it must for a certain time add to its name "and reduced" as the last words in its name, and such words are part of its

(*a*) See sects. 175, 176, 177. As to the liability of the shareholders of a company to be sued personally when the number of its members is less than seven; see sect. 48.

name. Every company under the Act must have a registered officer, to whom all communications and notices may be addressed.

Where a limited company is plaintiff, a judge may, if there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given (s. 69).

Members of the company and others, subject to reasonable restrictions, may inspect the register of members kept under this Act, and may have a copy of the same, or any part thereof (s. 32).

Sect. 13 provides for the company changing its name, and enacts that any legal proceedings may be continued or commenced against the company by its new name.

The power to make calls on shares, and the mode of enforcing same, depend on the memorandum of association by which the company is incorporated. By sect. 70, in any action brought by the company against any member to recover any call or other monies due from him in his character of member, it is not necessary to set forth the special matter, but it is sufficient to allege that the defendant is a member of the company, and is indebted to the company in respect of a call made or other monies due, whereby an action or suit hath accrued to the company.

The register of members kept under the Act is *prima facie* evidence of any matters by the Act directed or authorised to be inserted therein (s. 37). And see sect. 67 as to minutes of proceedings at meetings of the company, &c., being evidence.

Execution may be issued against the property of the company. If a company is unable to pay its debts, and in certain other cases, it may be ordered to be wound up, and in this way the shareholders may be compelled to contribute towards the payments of the debts of the company, according to the extent of their liability.

By sect. 163, where any company is being wound up by the court, or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up is void. Sect. 164 makes void as against creditors of the company an execution, &c., by way of fraudulent preference.

By Part 7 of the Act, certain companies are authorised to register under it, and by sect. 195 all legal proceedings,

PART VIII. which, at the time of the registration, have been commenced by or against the company, or the public officer, or any member thereof, may be continued as if such registration had not taken place; but execution cannot issue against the effects of any member of such company. If the property of the company is insufficient to satisfy the judgment, an order may be obtained for winding up the company. Sect. 196 points out the effects of registration under this part of the Act, and how members are to contribute in the event of the company being wound up.

The order for winding up in England is in general obtained from the Chancery Division of the High Court of Justice upon petition, and the winding up by the court is deemed to commence at the time of the presentation of such petition (s. 84). Sect. 38 states in what order, and to what extent, the shareholders shall contribute to the debts and liabilities of the company. In the case of a limited company, a shareholder is not liable beyond the amount unpaid on his shares, or the amount guaranteed by the memorandum of association. But if by the memorandum of association the liability of the directors or managers of the company be unlimited, such directors or managers are, subject to certain provisions, in addition to their liability, if any, as ordinary members, liable to contribute as if they were members of an unlimited company (30 & 31 Vict. c. 131, s. 5).

The court (a) may at any time after the presentation of the petition for winding up, upon the application of the company, or of any creditor or contributory thereof, restrain further proceedings in any action or proceeding against the company, upon such terms as may be thought fit.

By sect. 87, "when an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the court (a), and subject to such terms as the court may impose (b).

The Act provides for the proceedings by liquidators, when a company under the above Act is ordered to be wound up (s. 92, *et seq.*).

(a) That is to say, the court having jurisdiction in the winding up, which in general is the Chancery Division of the High Court of Justice; sometimes a County Court has jurisdiction in the winding up. (See 30 & 31 Vict. c. 131, s. 41.)

(b) See also sects. 197, 198, similar clauses to the above which apply to companies registered under the 7th Part of the Act (*ante*, p. 217), and by which actions against contributories of the company may be restrained.



By sect. 102, and subsequent sections, the court having jurisdiction in the winding up has power to make calls on the contributories to the extent of their liability, which calls may be enforced in the mode pointed out by the Act, or by action.

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Sect. 129 and other following sections state when and how companies under this Act may be wound up voluntarily. By sect 130, "A voluntary winding up is deemed to commence at the time of the passing of the resolution authorising such winding up.

By sect. 147, and some following sections, a company may be wound up subject to the supervision of the court (a).

By sect. 199, and following sections, certain unregistered companies, associations, and partnerships may be wound up. The court (a) may, at any time after the presentation of a petition for winding up such a company, upon the application of any creditor of the company, restrain further proceedings in any proceeding against any contributory of the company, or against the company upon such terms as the court thinks fit (s. 201) (see *ex parte Parry, re the Great Ship Company (Limited)*, 33 L. J. Ch. 245). Where an order has been made for winding up an unregistered company, no legal proceedings can be commenced or proceeded with against any contributory of the company in respect of any debt of the company, except with the leave of the Court (a) and subject to such terms as the court may impose (s. 202). If such company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the court (a) may direct that the property of the company and their rights of action, or any part thereof, shall vest in the official liquidators by their official names, and they may in their official names, or in such names, and after giving such indemnity as the court directs, bring or defend any actions, suits, or other legal proceeding relating to any property vested in them, or any actions, suits or other legal proceedings necessary to be brought or defended for the purposes of effectually winding up the company and recovering the property thereof (s. 203).

By sect. 204 the provisions in this part of the Act are in addition to the provisions thereinbefore contained with respect to winding up companies by the court, and the court or official liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised

(a) See note (a), *ante*, p. 218.

PART VIII. or be done by it or him in winding up companies formed under this Act; but an unregistered company is, except in the event of its being wound up, deemed to be a company under this Act, and then only to the extent provided by this part of the Act.

*c. Railway and similar Companies.*

Railway  
and similar  
companies.

Next will be considered proceedings by and against *railway and similar companies*, under the 8 & 9 Vict. c. 16, called "The Companies Clauses Consolidation Act, 1845," and the 26 & 27 Vict. c. 117, called "The Companies Clauses Consolidation Act, 1863." These Acts, or parts of them, are frequently incorporated in Acts incorporating companies for the purpose of carrying on certain undertakings.

Every person who has contracted to subscribe the prescribed sum or upwards to the capital of the company, or is entitled to a share in the company, and whose name is entered on the register of shareholders, is deemed a shareholder of the company (s. 8).

The company are to keep a book, to be called the "register of shareholders," and in such book is to be entered from time to time the names of the parties entitled to shares, and such book is to be authenticated by the common seal of the company being affixed thereto (s. 9).

The company should be described in the writ of summons and other proceedings by their corporate name.

The 8 & 9 Vict. c. 16, s. 141, provides for a party committing any irregularity, trespass, or other wrongful proceeding in the execution of this or the special Act, before action brought, making tender of amends.

By sect. 132, "Any summons or notice, or any writ or other proceeding at law or in equity, requiring to be served upon the company, may be served by the same being left at or transmitted through the post, directed to the principal office of the company, or one of their principal offices where there shall be more than one, or being given personally to the secretary, or in case there be no secretary, then by being given to any one director of the company.

The 26 & 27 Vict. c. 118, s. 36, and following sections, make provision for a company changing its name.

Restrictions have been placed on the liability of the rolling stock and plant of railway companies to be taken in execution (see 30 & 31 Vict. c. 127; 31 & 32 Vict. c. 79, s. 4; 38 & 39 Vict. c. 31); and by 30 & 31 Vict. c. 127, ss. 6-9, directors of a railway company unable to meet their

engagements with their creditors may prepare a scheme of arrangement and file the same in the Court of Chancery, and thereupon actions against the company may be restrained.

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If execution be issued against the property of the company, and sufficient be not found to satisfy the same, execution may, by leave of the court in which the action is brought, be issued against any of the shareholders who were such at the time of the return of *nulla bona* to the execution issued against the company, to the extent of their shares in the capital of the company not then paid up. In order to get execution against a shareholder, execution should be issued against the property and effects of the company, and reasonable efforts should be made to levy under such execution. A sufficient notice must be given to the shareholder that an application will be made to the court for leave to proceed against him (8 & 9 Vict. c. 16, s. 36) (a). The affidavit in support of the application, which must be made in open court, should show that the party against whom the application is made was a shareholder of the company at the time of the return of *nulla bona*; how many shares he then had; how much thereof has not been paid up; that judgment has been obtained against the company; how much remains due thereon; that execution has issued against the property and effects of the company, and that the plaintiff has used due diligence to levy under it and obtain his debt from such property and effects. An affidavit must also be made of the service of the notice referred to in the above 36th sect. The court will not order execution to issue against the shareholder, but only gives leave to proceed to execution against him.

Execution  
against  
share-  
holders.

It seems that since the Judicature Acts, the proper mode

(a) By this enactment, "if any execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up: Provided always, that no such execution shall issue against any shareholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court after sufficient notice in writing to the persons sought to be charged; and upon such motion such court may order execution to issue accordingly; and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee."

**PART VIII.** of proceeding to obtain execution against a shareholder is by writ of summons, and not by *scire facias*, the mode of proceeding before the Judicature Acts, as the *scire facias* was an action commenced by writ, and such an action, as noticed *ante*, p. 57, is now to be commenced by writ of summons. It seems that in this action against the shareholder he cannot plead that due efforts were not made to enforce the judgment against the company, or that no order of the court was obtained for leave to proceed to execution against him. If by means of an execution against a shareholder, he pay any money beyond the amount then due from him in respect of calls, he is to be reimbursed such additional sum by the directors out of the funds of the company (s. 37, 8 & 9 Vict. c. 16).

Action for  
calls.

The directors of the company have power to make calls upon the shareholders in respect of the capital for which they have subscribed, and the company may recover the same by action, in which only certain proof is required (8 & 9 Vict. c. 16, s. 21, *et seq.*). By s. 28 the production of the sealed register of shareholders is *prima facie* evidence of the defendant being a shareholder, and of the number and amount of his shares.

*d. Companies suing &c., in name of P. O.*

Companies  
suing in  
name of  
P. O.

Certain *banking (a) and other companies* may sue and be sued in the name of one of their public officers, &c. The 7 Geo. 4, c. 46, the Act relating to banking companies, renders it obligatory upon a banking company in cases within it to sue in the name of their public officer. So, the creditors of such a company cannot sue an individual member of the company for a debt of the company, but must proceed against the public officer. But some of these statutes are permissive only, and not imperative. It is not perhaps necessary to describe a public officer or other nominal defendant as such in a writ of summons, though it is usual to do so. The statement of claim should show that the plaintiff or defendant, as the case may be, is the public officer, and entitled to sue or be sued on behalf of the company, and a cause of action to or against the company.

If the public officer die or be removed, and another appointed, a suggestion of such fact should be entered in the usual way.

Execution can almost always be issued against the property of the company, and the statute authorising the com-

(a) 7 Geo. 4, c. 46. See 1 & 2 Vict. c. 96; 5 & 6 Vict. c. 85.

pany to sue and be sued, in general, points out in what way and order the shareholders shall be liable (see 7 Geo. 4, c. XXXIII. CHAP. 46, s. 13). The proper mode of proceeding to execution against a shareholder is in general by action (*ante*, p. 222); but sometimes it is sufficient to proceed in some other way, and sometimes it is necessary to obtain leave of the court before proceeding to execution against a shareholder, and when such leave is necessary, it will not in general be granted unless due diligence has been used to obtain satisfaction of the judgment from the property of the company and other shareholders, if any, primarily liable. Where judgment is obtained against the public officer under the 7 Geo. 4, c. 46, the proper mode of proceeding to execution against a member not being such public officer, is by action, which is now commenced by a writ of summons. It seems that execution may be issued against such public officer without bringing such action. The defendant cannot plead to such action anything which might have been pleaded to the original action. Nor can he plead in abatement the non-joinder of other members of the co-partnership.

The shareholders of some companies sued as above are not personally liable, but the plaintiff's only remedy is against the property of the company. Where the trustees of a turnpike road were sued in the name of their clerk, in pursuance of the 3 Geo. 4, c. 126, s. 74, it was held that the property of the clerk was not liable to be taken in execution to satisfy the judgment (*Wormwell v. Hailstone*, 6 Bing. 668; 4 M. & P. 512; *Cobbett v. Wheeler*, 30 L. J. Q. B. 64).

## CHAPTER XXXIV.

## ACTIONS BY AND AGAINST BANKRUPTS AND THEIR TRUSTEES.

PART VIII. In this chapter, proceedings by and against *bankrupts and their trustees* will be considered. The 32 & 33 Vict. c. 71, the Bankruptcy Act, 1869, made a considerable alteration in the law relating to bankruptcy. We should first state that s. 72 gives power to the Court of Bankruptcy to decide all questions, whether of law or fact, arising in bankruptcy. Under this section many most important questions as to priorities, fraudulent preferences, &c., may be decided. By ss. 97 & 98, the Court of Bankruptcy may examine persons on oath, and if any person on such examination admit he is indebted to the bankrupt, such court may, on the application of the trustee, order the debt admitted, or any part thereof to be paid to the trustee, at any time and manner, either in full discharge of the whole amount in question or not, with or without costs of the examination. The Court of Bankruptcy has power to restrain proceedings in the High Court of Justice (*Ex parte Ditton*, 45 L. J. B. 87).

For any debt due to the bankrupt previous to the bankruptcy, or for any other cause of action which passes to the trustees (a), the action should be brought by them. But if the bankrupt at the time of his bankruptcy had no beneficial interest in the debt, as if he had assigned all his interest in it to a third person, and for other causes of action which do not pass to the trustees, the action should be in the bankrupt's name. The trustees of a bankrupt may sue and be sued by the official name of "the trustees of the property of a bankrupt," inserting the name of the bankrupt (s. 83). When any portion of the property of the bankrupt consists of things in action, any action, suit, or other proceeding for the recovery

(a) Until a trustee is appointed by the creditors, the registrar of the court is trustee (s. 17). In case of vacancy in the office of trustee, the registrar is to act as such (s. 83). The property of the bankrupt passes from trustee to trustee without any conveyance (s. 83).

thereof brought by the trustees must be instituted in their official name (s. 22).

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Where a member of a partnership is bankrupt, the Court of Bankruptcy may authorise the trustees, with the consent of the creditors, certified by a special resolution, to commence and prosecute any action or suit in the names of the trustees and of the bankrupt's partner, and any release by such partner of the debt or demand to which the action or suit relates will be void; but notice of the application for authority to commence the action or suit must be given to such partner, and he may show cause against it, and on his application the court may, if it think fit, direct that he shall receive his proper share of the proceeds of the action or suit, and if he does not claim any benefit therefrom he must be indemnified against costs in respect thereof as the court directs (s. 105).

Any person to whom anything in action belonging to the bankrupt is assigned, in pursuance of this Act, may bring or defend any action or suit relating thereto in his own name (s. 111).

Where a bankrupt is a contractor in respect of any contract jointly with any other person or persons, such person or persons may sue or be sued in respect of such contract without the joinder of the bankrupt (s. 112).

In actions by trustees of a bankrupt the process is the same, and the pleadings are filed or delivered as in ordinary cases. In such actions the character in which the plaintiffs are stated in the pleadings to sue is not in issue, unless specially denied (O. 19, r. 11). Sect. 39 is the mutual credit clause, by which mutual debts and dealings between the bankrupt and his creditors must, except in certain cases, be set off one against the other. The trustees may, with the sanction of the committee of inspection (a), refer any dispute to arbitration and compromise debts, &c. In actions by trustees of a bankrupt the costs are the same as in ordinary cases, and so is the judgment and execution.

With regard to actions against bankrupts, or their trustees, some remarks should be made.

No action or suit lies against trustees for a dividend, the remedy for the non-payment thereof is by application to the Court of Bankruptcy (s. 46).

By sect. 13 the Court of Bankruptcy, having jurisdiction in the matter, may at any time after the presentation of a bankruptcy petition, restrain further proceedings in any

(a) This committee is appointed by the creditors (s. 14).

PART VIII. action against the debtor in respect of any debt provable under the bankruptcy, or it may allow the proceedings to proceed upon such terms as the court may think just (see *ante*, p. 224. *Ex parte Harold*, 45 L. J. B. 121).

The 54th section states what is to be the *status* of a bankrupt who does not get his order of discharge. By this section debts provable under the bankruptcy cannot be enforced against the property of the bankrupt until the expiration of three years from the close of the bankruptcy, and then, if no order of discharge is obtained, the creditor's remedy is in the Court of Bankruptcy. The order of discharge does not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it releases the bankrupt from all other debts provable under the bankruptcy, with the exception of debts due to the Crown, and in respect of offences against the revenue laws. And he is not discharged from such excepted debts unless the Commissioners of the Treasury certify in writing their consent to his being discharged therefrom. An order of discharge is sufficient evidence of the bankruptcy, and of the validity of the proceedings thereon, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge, in respect of any debt from which he is released by such order, the bankrupt may plead that the cause of action occurred before his discharge, and may give this Act and the special matter in evidence (s. 49). The order of discharge does not release any person who at the date of the order of adjudication was a partner with the bankrupt, or was jointly bound or had made any joint contract with him (s. 50). If a bankrupt, after he has obtained his order of discharge, be sued for a debt from which he has been discharged thereby, he should plead the order of discharge as a defence to the action. If the defendant obtain his order of discharge after action brought, and be unable to plead it, the court will, upon motion, stay the proceedings in the action.

If one of several defendants plead bankruptcy, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others, whether the action be upon contract or in tort; upon which *nolle prosequi* the plaintiff will be liable to the costs of that defendant (3 & 4 W. 4, c. 42, s. 32). Such defendant need not have been joined in the action if his order of discharge was obtained before action brought.

In actions against bankrupts, the costs and judgment are



the same as in ordinary cases. As to execution against a bankrupt, see *ante*, p. 168.

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By sect. 125 of the Bankruptcy Act, 1869, the affairs of a debtor unable to pay his debts may be liquidated by arrangement with his creditors, and not in bankruptcy. In this case one or more trustees is or are appointed, and actions are brought by him or them almost in the same way as when the debtor is a bankrupt, and most of the provisions in the Act above referred to apply. The registration by the registrar of the Court of Bankruptcy of a special resolution of the creditors for a liquidation by arrangement, in the absence of fraud is conclusive evidence of the passing of the resolution, and that the necessary requisitions were complied with (s. 127). Where no committee of inspection is appointed the trustee may act on his own discretion in cases where he would otherwise have been bound to refer to such committee (s. 125). The trustee has to report to the registrar the discharge of the debtor, and a certificate of such discharge given by the registrar has the same effect as an order of discharge given to a bankrupt under this Act (s. 125; *Ebbs v. Boulnois*, 45, L. J. Ch. 691). The liquidation is deemed to have commenced as from the date of the appointment of the trustee (s. 125).

Sect. 126 of the Bankruptcy Act, 1869, provides for a composition with creditors without any proceedings in bankruptcy. Under this section a certain majority in number and value of the creditors, by proceeding in the mode pointed out by this section, can pass a resolution that a composition shall be accepted in satisfaction of the debts due from the debtor; and such resolution is binding on all the creditors whose names, addresses, and debts are shown in the statement of the debtor produced to the meeting at which the resolution was passed. But it is of no validity until the same, with a statement of assets and debts, has been registered with the registrar of the Court of Bankruptcy. The registration, in the absence of fraud, is conclusive evidence of the resolution being passed, and of all necessary requisitions having been complied with.

## PART IX.

## PROCEEDINGS IN DISTRICT REGISTRIES.

## CHAPTER XXXV.

## PROCEEDINGS IN DISTRICT REGISTRIES.

IN order to facilitate certain proceedings in country districts, Her Majesty in Council, under the Judicature Act, 1873, has established district registries and registrars in certain districts (*a*), from which writs of summons for the commencement of actions in the High Court of Justice may be issued, and in which certain proceedings may be taken and recorded (J. A. 1873, s. 60). By J. A., 1875, s. 13, two persons may be appointed to perform the duties of district registrar.

District  
registrar.

A district registrar is an officer of the Supreme Court, and he and the other officers of the district registry are subject to the jurisdiction of such court, and of the divisions thereof; and every proceeding in a district registry is subject to the control of the court or a judge, as fully as a like proceeding in London (O. 35, r. 9; J. A. 1875, s. 13). A district registrar has power to administer oaths, and he may be required to do certain acts by special order of the court (J. A. 1873, s. 62). He has to pay to the Treasury moneys paid into court at his registry (O. 11, 1 Dec. 1875). He may, with the approval of the Lord Chancellor, and subject to regulations to be made by him, appoint a deputy for a period not exceeding three months, who has the same powers as the registrar (J. A. 1876, s. 22).

Seal of  
district  
registry.

In every district registry a seal is used which is impressed on all writs and documents issued out of or filed in such registry. All such writs and documents and copies and exemplifications thereof, purporting to be sealed with such seal, are received in evidence without further proof (J. A. 1873, s. 61).

(a) See the Order in Council in the Appendix (H).

In any action other than a probate action, the plaintiff, wherever resident, may issue a writ of summons out of the registry of any district (O. 5, r. 1). This includes a writ under the Bills of Exchange Act (*Oger v. Bradman*, 45 L. J. C. P. 273, L. R. 1, C. P. 334). Where the defendant neither resides nor carries on business within the district out of the registry whereof the writ of summons is issued, there must be a statement on the face of it, that he may cause an appearance to be entered at his option either at the district registry or the London office (O. 5, r. 2). Where the defendant resides or carries on business within the district, and the writ is issued out of the district registry, there should be a statement on the face of the writ that the defendant do cause an appearance to be entered at the district registry.

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Writ of  
summons  
may be  
issued out  
of district  
registry.

By r. 3, 23rd February, 1876, in all cases where a writ of summons is issued out of a district registry, the solicitor shall give on the writ the address of the plaintiff, and his own name or firm and his place of business, which shall, if his place of business be within the district of the registry, be an address for service, and if such place be not within the district, he shall add an address for service within the district; and where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar; and where the solicitor issuing the writ is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor. Where the plaintiff sues in person, he shall give on the writ his place of residence and occupation, which shall, if his place of residence be within the district, be an address for service, and if such place be not within the district, he shall add an address for service within the district, and, where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar.

By r. 12, 26th June, 1876, where an action proceeds in the district registry, all proceedings, except where by any of the rules it is otherwise provided, or the court or a judge otherwise orders, must be taken in the district registry, down to and including final judgment, and every final judgment and every order for an account by reason of the default of the defendant or by consent must be entered in the district registry, in the proper book, in the same manner as a like judgment or order in an action proceeding

Subsequent  
proceed-  
ings.

PART IX. London would be entered in London (see J. A., 1873, s. 64).

A district registrar cannot grant leave for service out of the jurisdiction of a writ of summons or of notice thereof (R. 19, 26th June, 1876).

Where a writ under the Bills of Exchange Act is issued from a district registry, though the defendant neither resides nor carries on business within that district, it seems that under this rule leave to appear must be obtained within that registry, unless the judge or court otherwise order (*Oger v. Bradman*, 45 L. J. C. P. 273, L. R. 1, C. P. 334).

We have already seen, *ante* p. 69, how and when an appearance in ordinary cases is entered. If any defendant to a writ issued in a district registry resides or carries on business within the district, he must appear in the district registry. If he neither resides nor carries on business in the district, he may appear either in the district registry, or in London. If a sole defendant appears, or all the defendants appear in the district registry, or if all the defendants who appear appear in the district registry, and the others make default in appearance, then, subject to the power of removal, the action proceeds in the district registry. If the defendant appears, or any of the defendants appear, in London the action proceeds in London; but the court or a judge may, if satisfied that the defendant appearing in London is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, order that the action proceed in the district registry, notwithstanding such appearance in London (O. 12, rr. 1—5).

By O. 19, r. 29, where the action proceeds in a district registry all pleadings and other documents required to be filed must be filed in the district registry.

By r. 12, 26th June, 1876, where the writ of summons is issued out of a district registry, and the plaintiff's claim is for detention of goods and pecuniary damages, or either of them, and he is entitled to enter interlocutory judgment for default of appearance or delivery of defence or demurrer in due time (*a*), such interlocutory judgment, and when damages have been assessed, final judgment, must be entered in the district registry, unless the court or judge otherwise order.

Where a defendant fails to appear to a writ of summons issued out of a district registry, and the defendant had the option of entering an appearance in the district

(a) As to entering judgment by default in these cases, see *ante*, p. 92.

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registry or in the London office, judgment for want of appearance can not be entered by the plaintiff until after such time as a letter posted in London on the previous evening, in due time for delivery to him on the following morning, ought, in due course of post, to have reached him.

Actions in the Queen's Bench, Common Pleas, and Exchequer Divisions must be entered for trial with the associates, and not in the district registry.

Where an action proceeds in the district registry, final judgment is entered in such registry, unless the judge at the trial, or the court or a judge otherwise order. The final judgment is entered in the district registry, in the proper book, in the same way as a final judgment is entered in London (R. 12, 26th June, 1876, *ante*, p. 149).

Where final judgment is entered in the district registry costs are taxed in such registry, unless the court or a judge otherwise order (O. 35, r. 3).

Where an action proceeds in the district registry all writs of execution for enforcing any judgment or order therein issue from the district registry, unless the court or a judge otherwise direct (O. 35, r. 3).

Where an action proceeds in a district registry, the district registrar may exercise all such authority and jurisdiction in respect of the action as may be exercised by a judge at chambers, except such as by the rules a master of the Queen's Bench, Common Pleas, or Exchequer Divisions is precluded from exercising (O. 35, r. 4, *ante*, p. 53). Every application to the registrar must be made in the same manner in which applications at chambers are directed to be made by the rules (O. 35, r. 5). If any matter appears to the district registrar proper for the decision of a judge, the registrar may refer the same to him, and he may either dispose of the matter or refer the same back to the registrar with such directions as he may think fit (O. 35, r. 6. Bitt. 67.)

Any person affected by any order or decision, though in respect of a matter as to which the registrar had jurisdiction only by consent, may appeal to a judge. Such appeal must be by summons within four days after the decision complained of, or such further time as may be allowed by a judge or the registrar (O. 35, r. 7). An appeal is no stay of proceedings unless so ordered by a judge or the registrar (O. 35, r. 8).

By Judicature Act, 1873, s. 65, any party to an action may, in the manner prescribed by the rules of court, remove the same into the proper office of the High Court.

Appeal from registrar's decision.  
  
Removal of action from district registry.

PART IX. By O. 35, r. 11, a defendant may remove the action from the district registry as of right in the cases, and within the times, following :

Where the writ is specially indorsed under Order 3, rule 6 (a), and the plaintiff does not within four days after the appearance of such defendant give notice of an application for an order against him under Order 14, *ante* ; then such defendant may remove the action as of right at any time after the expiration of such four days, and before delivering a defence, and before the expiration of the time for doing so :

Where the writ is specially indorsed, and the plaintiff has made such application as in the last paragraph mentioned, and the defendant has obtained leave to defend in manner provided by Order 14 (*ante*, p. 71) ; then such defendant may remove the action as of right at any time after the order giving him leave to defend, and before delivering a defence and before the expiration of the time for doing so :

Where the writ is not specially indorsed, any defendant may remove the action as of right at any time after appearance, and before delivering a defence, and before the expiration of the time for doing so.

Any defendant desirous to remove an action as of right under the last preceding rule, may do so by serving upon the other parties to the action, and delivering to the district registrar a notice, signed by himself or his solicitor, to the effect that he desires the action to be removed to London, and the action is removed accordingly : But the court or a judge, if satisfied that the defendant is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, may order that the action proceed in the district registry notwithstanding such notice (O. 35, r. 12).

In any case not provided for by the last two preceding rules, the court, judge, or registrar may, upon the application of any party to the action, order the removal of the action as above, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall seem just (O. 35, r. 13).

When the action is removed into the High Court, the proceedings and such original documents, if any, as are filed

(a) This is the rule which enables a plaintiff specially to indorse a writ where the claim is for a debt or liquidated demand in money (see *ante*, p. 59).

therein, and a copy of all entries in the books of the district registry of the proceedings in the action must, upon the receipt of the notice or order removing same, be transmitted by the district registrar to the proper office of the High Court, and the said action thenceforth proceeds in the High Court, in the same manner as if it had been originally commenced by a writ of summons issued out of the proper office in London; or the court or judge may direct that the proceedings continue to be taken in the district registry (J. A. 1873, s. 65; O. 35, r. 14).

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The court or a judge may, upon the application of any party to an action proceeding in London, make an order for the removal of the same to any district registry, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as may seem just (O. 35, r. 13).

Removing  
action from  
London to  
district  
registry.

By Judicature Act, 1873, s. 66, the court or judge of the division to which a cause or matter pending in the said High Court is assigned, may order that any books or documents may be produced, or any accounts taken, or inquiries made, in the office of or by any district registrar; and in such case the registrar must proceed to carry all such directions into effect in the manner prescribed; and when accounts or inquiries have been directed to be taken or made by him, his report in writing as to the results of such accounts or inquiries may be acted upon by the court.

Directing  
accounts to  
be taken by  
registrar.

## PART X.

## ARBITRATION.

## CHAPTER XXXVI.

## REFERENCES TO OFFICIAL AND SPECIAL REFEREES.

BEFORE the passing of the Judicature Acts certain compulsory powers (hereinafter noticed, and which are still in existence) of referring to arbitration were given by the Common Law Procedure Act, 1854, ss. 3, &c., where the matters in dispute in a cause consisted wholly or in part of matters of mere account, which could not be conveniently tried in the ordinary way. Under the Judicature Acts four official referees are appointed. They are permanent officers attached to the Supreme Court for the purpose of trying questions referred to them under the Acts (J. A. 1873, s. 83). They perform the duties entrusted to them in such places in London or in the country as may from time to time be directed or authorised by any order of the High Court or of the Court of Appeal; and all proper and reasonable travelling expenses incurred by them in the discharge of their duties are paid.

By Judicature Act, 1873, s. 56, subject to any rules of court and to such right as may now exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the crown) before the High Court of Justice or before the Court of Appeal, may be referred by the court or by any divisional court or judge (*Sugg v. Silber*, 45 L. J. Q. B. 460, L. R. 1 Q. B. 362), before whom such cause or matter may be pending, for inquiry, and report to any official or special referee (a), and the report of any such referee may be adopted wholly or partially by the court, and may (if so adopted) be enforced as a judgment by the court.

(a) By O. 36, r. 2, an action may be tried before such referees with assessors.



By Judicature Act, 1873, s. 57, in any cause or matter (other than a criminal proceeding by the crown) before the said High Court, in which all parties interested who are under no disability consent thereto, and also without such consent, in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the court or a judge, conveniently be made before a jury, or conducted by the court through its other ordinary officers, the court or a judge may at any time, on such terms as may be thought proper, order any question or issue of fact or any question of account (*Rowliffe v. Leigh*, L. R. 1 Ch. 292), arising therein to be tried either before an official referee or a special referee, to be agreed on between the parties. Under this section an order will not be made, without the consent of all parties, to refer an action involving charges of fraud to be tried before a referee (*Leigh v. Brooks*, 45 L. J. Ch. 344).

By Judicature Act, 1873, s. 58, in case of a reference to or trial by a referee under the Judicature Acts, he is deemed to be an officer of the court, and has such authority for the purpose of such reference or trial, as is prescribed by the rules of court, or, subject to such rules, by the court or judge ordering such reference or trial (J. A. 1873, ss. 57, 58). A special referee has the same powers and duties, and proceeds in the same manner as an official referee (J. A. 1873, s. 57).

By r. 14, 26th June, 1876, the business referred to the official referees is distributed among them in rotation by the clerks to the registrars of the Supreme Court, Chancery Division, in like manner as business is referred to conveying counsel of the court, under O. 2 of Consolidated General Orders of the Court of Chancery. By r. 15, 26th June, 1876, when an order is made referring any business to the official referee in rotation, such order, or a duplicate of it, should be produced to the registrar's clerk, and he will (except in the case provided for by r. 16, presently mentioned) indorse thereon a note specifying the name of the official referee in rotation to whom such business is to be referred, and the order so endorsed is a sufficient authority for the official referee to proceed with the reference. By r. 16, 26th June, 1876, the two last preceding rules do not interfere with the power of the court, or a judge, to direct or transfer a reference to any one in particular of the said official referees, where it appears expedient so to do, but every such reference or transfer must be recorded in the

**PART X.** manner mentioned in rule 2 (a) of the second of the said Consolidated General Orders, and a note to that effect should be indorsed on the order of reference or transfer; and where any such reference or transfer is made to any one in particular of the said referees, the clerk, in making the distribution of the business according to such rotation as aforesaid, must have regard to any such reference or transfer.

Proceed-  
ings before  
referee.

By O. 36, r. 30, the referee may, subject to the order of the court or a judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He must, unless otherwise directed by the court or a judge, proceed with the trial *de die in diem*, in a similar manner as in actions tried by a jury. But this last-mentioned direction is directory only (*Robinson v. Robinson*, 35 L. T. 337). At what time and at what hours the official referees are to sit, see r. 10, 23rd February, 1876, noticed *ante*, p. 20.

By O. 36, r. 31, subject to any order to be made by the court or judge ordering the same, evidence must be taken at the trial before a referee, and the trial must be conducted in the same manner, as nearly as circumstances will admit, as trials before a judge of the High Court, but not so as to make the tribunal of the referee a public court of justice. The attendance of witnesses at the trial before a referee may be enforced by subpoena.

By O. 36, r. 32, subject to any such order as last aforesaid, the referee has the same authority in the conduct of any reference or trial as a judge of the High Court when presiding at any trial before him (see *ante*, p. 131). It seems an official referee, unless that there is anything in the order of reference to the contrary, has power to order the production of documents or the like. Such order, however, may be reviewed by the court (*Re Leigh's Estate*, 45 L. J. Ch. 60). He has not power to commit a person to prison or to enforce an order by attachment or otherwise (O. 36, r. 33).

By O. 36, r. 34, the referee may, before the conclusion of any trial before him, or by his report under the reference

(a) By this order, the clerk making such distribution shall be responsible for the business being distributed according to regular and just rotation, and in such manner as to keep secret from all persons the rota or succession of conveying counsel to whom such business may be referred; and it shall be his duty to keep a record of such references, with proper indexes, and to enter therein all such references, with the dates when the same are made.

made to him, submit any question arising therein for the decision of the court, or state any facts specially, with power to the court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the court may direct; and the court shall have power to require any explanation or reasons from the referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other referee.

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By r. 24th April, 1877 (a), the fee to be taken by an official referee in respect of all matters, questions, or issues referred to him by any order, is the sum of 5*l.* for the entire reference, irrespective of the time occupied, which sum must be paid before the reference is proceeded with. The fee is collected by means of a stamp or stamps affixed to the appointment paper or summons issued by the official referee for appointing the time and place for proceeding with the reference. Where the sittings under a reference are to be held elsewhere than in London, a convenient place in which the sittings may be held must be provided to the satisfaction of the official referee, by and at the expense of the party proceeding with the reference; and there must be paid, in addition to the above fee of 5*l.*, 1*l.* 1*s.* 6*d.* for every night the official referee, and 15*s.* for every night his clerk, are absent from London on the business of the reference, together with the reasonable expenses of their travelling from London and back. A deposit on account of expenses may be required before proceeding with the reference, or at any time during the course thereof; and a memorandum of the amount deposited must be delivered to the party making the deposit. The fees and expenses and deposit (if any) must be paid in the first instance by the party proceeding with the reference. The official referees have to account for all monies received by them.

The report of the referee upon any question of fact on any trial before him is (unless set aside by the court) equivalent to the verdict of a jury (J. A. 1873, s. 58). Effect of report.

As to the motion for judgment, or to set aside the same, when an action has been tried before a referee, see O. 40, *ante*, p. 143. The report of the referee, if adopted by the court, may be enforced as a judgment by the court (J. A. 1873, s. 56). Where a case at the trial is referred by order, and the arbitrator is put in the place of the jury, it seems that

(a) The remuneration, if any, to be paid to a special referee must be determined by the Court (see J. A. 1873, s. 56).

**PART X.** judgment may be entered at once upon the award, without setting down the case on motion for judgment under O. 40, r. 3, or applying to the court for directions under the Judicature Act, s. 22 (*Lloyd v. Lewis*, L. R. 2 Ex. 7).

By the Judicature Act, 1873, s. 59, with respect to all such proceedings before referees and their reports, the court or judge ordering the reference or trial has, in addition to any other powers, the same or the like powers as are given to any court whose jurisdiction is hereby transferred to the said High Court with respect to references to arbitration and proceedings before arbitrators and their awards respectively, by the Common Law Procedure Act, 1854, noticed *post*, ch. 37.

As to accounts being taken and inquiries made in the office of or by the district registrar, see Judicature Act, 1873, s. 66, *ante*, p. 233.

## CHAPTER XXXVII.

COMPULSORY REFERENCE UNDER COMMON LAW PROCEDURE ACT,  
1854.

THE Judicature Acts have not taken away the power of referring given by the Common Law Procedure Act, 1854, and therefore there may still be a reference of a cause to an arbitrator for decision under this Act, and in such case he cannot be required to report, but his decision is final, and not liable to be reviewed by the court, except on the ground on which an award might have been reviewed before the Judicature Act, 1873 (*Cruikshank v. The Floating Swimming Bath Co.*, 45 L. J. C. P. 684; L. R. 1 C. P. 260).

By the Common Law Procedure Act, 1854, s. 3, upon the application of either party, at any time after the issuing of the writ, the court or a judge may, if satisfied that the matter in dispute consists wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way, decide such matter in a summary manner, or order it, either wholly or in part, to be referred to an arbitrator appointed by the parties, or to an officer of the court, upon such terms as to costs and otherwise as may be thought reasonable. The decision or order of the court or judge, or the award or certificate of the referee, may be enforced by the same process as the finding of a jury upon the matter referred. Where the allowance or disallowance of any item in such account depends upon a question of law or fact, the court or a judge may direct a case to be stated for the opinion of the court, or an issue of fact to be tried by a jury. A judge, by consent, may decide such question of fact, and the decision of the court, upon such case, and the finding of the jury or judge upon such issue or issues, must be acted upon by the arbitrator as conclusive (s. 4).

The proceedings upon the arbitration, unless otherwise directed by the order of reference, are for the most part conducted in like manner and are subject to the same rules, &c., as to the power of the arbitrator and of the court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, &c., as upon a reference made by consent under a rule of court or judge's order.

By s. 15, the arbitrator must make his award, unless the order of reference contains a different limit of time, within

PART X.

three months after his appointment and entering on the reference, or his being called upon to act, by a notice in writing. The parties may, however, by consent in writing, enlarge the time for making the award. Before the Judicature Acts, the court, of which such order was made a rule, or any judge thereof, for good cause to be stated in the rule or order for enlargement, might enlarge the time for making the award ; and if no period were stated for the enlargement, it was deemed to be an enlargement for one month. Where an umpire has been appointed, he may enter on the reference in lieu of the arbitrators, if the latter have allowed their time to expire without making an award, or have delivered to any party, or to the umpire, a notice in writing stating that they cannot agree.

The award need not be stamped, but it must be signed by the arbitrator (s. 15). He has no power over the costs of the reference unless it is given him by the order of reference (*Welmhurst, Hollick, & Co., v. Barrow Shipbuilding Co.*, 46 L. J. Q. B. 477). He may, if it is not provided to the contrary in the order, state his award as to the whole or any part of it in the form of a special case for the opinion of the court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the court (s. 5).

An application to set aside the award must, before the Judicature Acts, have been made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term (s. 9 ; see *ante*, p. 16).

The court or a judge has power to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the arbitrator, upon such terms as to costs and otherwise as may be thought proper (s. 8).

The award, if not set aside, is in general final (s. 9), the parties being bound by the decision of the arbitrator upon questions both of law and fact within his jurisdiction, as in the case of a voluntary reference (*Bagaley v. Markwick*, 30 L. J. C. P. 342).

The award or certificate of the referee is enforced by the same process as the finding of a jury upon the matter referred, and by authority of a judge, on such terms as to him may seem reasonable, it may be enforced at any time after seven days from the time of publication, notwithstanding that the time for moving to set it aside has not elapsed (ss. 3 & 10). As to enforcing an award directing the possession of land the subject of an action of ejectment to be delivered up, see s. 16.

## CHAPTER XXXVIII.

## ARBITRATION BY CONSENT.

MATTERS in difference may, in general, by consent, be referred to arbitration (a). Where no action is pending they are usually referred by a written agreement; where an action is pending by judge's order. In the latter case, however, the submission may be by rule of court. Mode of submission.

By the C. L. P. Act, 1854, s. 17 (b), any written submission by consent may be made a rule of any one of the superior courts of law or equity at Westminster, on the application of any party thereto, unless there is anything therein to the contrary. A parol submission cannot be made a rule of court (*Ex parte Glaysher*, 34 L. J. Exch. 41). The court has no jurisdiction to set aside or enforce an award until the submission when made by consent has been made a rule of court. The motion to make the submission a rule of court must be made on the original submission, unless the same has been lost, in which case the court will make a verified copy thereof a rule of court. In support of the motion an affidavit must be made of the due execution of the submission, unless the same was by judge's order; also, when it is necessary to make any enlargements of the time Making submission a rule of court.

(a) As to referring a criminal charge, see *R. v. Hardey*, 14 Q. B. 529; *R. v. Roxburgh*, 12 Cox C. C. 8.

(b) This section enacts that, "Every agreement or submission to arbitration by consent, whether by deed or instrument in writing, not under seal, may be made a rule of any one of the superior courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court; and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such superior courts, it may be made a rule of that court only; and if, when there is no such provision, a case be stated in the award for the opinion of one of the superior courts, and such court be specified in the award, and the document authorising the reference have not, before the publication of the award to the parties, been made a rule of court, such document may be made a rule only of the court specified in the award; and when in any case the document authorising the reference is or has been made a rule or order of any one of such superior courts, no other of such courts shall have any jurisdiction to entertain any motion respecting the arbitration or award."

**PART X.** for the making of the award a part of the rule of court, there should be an affidavit that the enlargements were duly made. If the time for making the award has been enlarged, and the award has been made within the enlarged time, it is necessary to make the enlargement a rule of court before moving to enforce the award.

When arbitrator refuses to act, &c.

If by a written submission the reference is to a single arbitrator not named, and all parties do not, after differences have arisen, concur in an appointment; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the submission does not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator do not do so; or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and by the submission it does not appear that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one; then in every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after the service of such notice it be not complied with, any judge of the High Court of Justice, upon summons taken out by the party having served such notice, may appoint an arbitrator, umpire, or third arbitrator, as the case may be, who has like power to act in the reference, and make an award as if he had been appointed by consent of all parties: C. L. P. Act, 1854, s. 12.

When the written submission is to two arbitrators, one appointed by each party, either party, in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, may substitute a new arbitrator, unless the submission show that the vacancy was not to be supplied. If on such a reference one party fail to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party has appointed an arbitrator, and served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference. The court or judge has power to revoke such appointment on such terms as may seem just, C. L. P. Act, 1854, s. 13.

Stay of proceedings in

If parties agree in writing to refer existing or future differences to arbitration, and any one or more of such parties, or



any person claiming under him or them afterwards bring an action in respect of such differences against any of the others of them, or any one claiming under him or them, the court or a judge has power to stay the proceedings in such action: C. L. P. Act, 1854, s. 11 (a). An agreement to refer is within this section, although contained in a separate instrument from that under which the dispute arose (*Randell v. Thompson*, 45 L. J. Q. B. 713). The application to stay the proceedings must be made after appearance and before delivering statement of defence. The defendant on making the application should show that at the time the action was commenced he was and is ready and willing to join in and concur in all acts necessary and proper for causing the matters in difference to be decided by arbitration. The proceedings will be stayed on such terms as to costs and otherwise as to the court or judge may seem fit. The exercise of the jurisdiction under this section is a matter of discretion.

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action  
brought  
after agree-  
ment to  
refer.

By the 3 & 4 Will. 4, c. 42, s. 39, the power of any arbitrator or umpire appointed by or in pursuance of any rule of court, or judge's order, or submission, containing an agreement that it shall be made a rule of any of His Majesty's Courts of Record is not *revocable by any party* to the reference without the leave of the court, by which such rule or order is made, or which is mentioned in such submission, or by leave of a judge. The authority of the arbitrator, in the absence of any stipulation in the submission to the contrary, is revoked by the death of either party to the submission before the award is made.

Revocation  
of submis-  
sion.

(a) This section enacts, "Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such court or judge may seem fit: Provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require."

- PART X.** The mode of conducting the reference depends upon circumstances. The arbitrator in general has a discretion as to the same. All of several joint arbitrators should attend and take part in the reference, and the evidence should be taken in their joint presence. If either party, after sufficient notice and proper opportunity of attending does not appear, the arbitrator may proceed in his absence; but the arbitrator should not proceed *ex parte* if there is a reasonable excuse for the party's non-attendance. The submission may make it optional or obligatory upon the arbitrator to swear witnesses. By the 14 & 15 Vict. c. 99, s. 16, every arbitrator having authority to hear, receive, and examine evidence is empowered to administer an oath to all such witnesses as are legally called before him. And see 3 & 4 Will. 4, c. 42, s. 41. The evidence should be taken in the presence of the arbitrator and of the parties, or of some one attending on their behalf. The arbitrator may, if he think fit, exclude persons who are to be examined before him whilst a witness is under examination or the like.
- Mode of conducting reference.**
- Compelling attendance of witnesses.** The 3 & 4 Will. 4, c. 42, s. 40, contains provisions for compelling the attendance of witnesses before an arbitrator, when the reference is by rule of court or judge's order, or by a submission containing an agreement that it may be made a rule of court.
- Enlarging time for making award.** If it be necessary that the time limited for making the award should be enlarged, the arbitrator may enlarge it as a matter of course, if a power be given him for that purpose in the submission. The mode of enlargement by the arbitrator depends entirely upon the terms of the submission. If no such power was given, the time may be enlarged by consent of the parties to the reference. By the Common Law Procedure Act, 1854, sect. 15, where the submission can be made a rule of court (*ante*, p. 241), the court by which the submission is made a rule or order, or any judge thereof may, for good cause to be stated in the rule or order for enlargement, from time to time enlarge the time for making the award (*Randall v. Thompson*, 45 L. J. Q. B. 713). If no period be stated for the enlargement, it is an enlargement for one month. Where an umpire has been appointed, he may enter on the reference in lieu of the arbitrators, if the latter have allowed their time or their extended time to expire without making an award, or have delivered to any party, or to the umpire, a notice in writing stating that they cannot agree. Before making the application to enlarge, the submission should be made a rule of court.

Where the reference is to two arbitrators, it is usual to make some provision in the submission as to the appointment of an umpire. If the arbitrators are therein given a power to appoint one generally, they may appoint the umpire at any time before or after the time limited for them to make their award, provided it be before the time limited for the umpire to make his umpirage. An appointment of an umpire by several arbitrators should be made by all at the same time in the presence of each other. By the Common Law Procedure Act, 1854, sect. 14, when a written submission is to two arbitrators, and it does not show that it was intended that there should not be an umpire, or provide otherwise for his appointment, the arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon by notice as aforesaid (see sect. 13, *ante*, p. 242) to make the appointment sooner. The appointment of the umpire should not be decided by chance. As to the appointment of an umpire when the parties to appoint him cannot agree upon the appointment, or in case of his death, see Common Law Procedure Act, 1854, sect. 12, *ante*, p. 242.

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Appoint-  
ment of  
umpire.

In general, the umpire should examine the witnesses himself, but, by agreement of the parties, he may receive the evidence from the arbitrators.

By the Common Law Procedure Act, 1854, s. 15, the arbitrator, acting under any submission which may be made a rule of court (*ante*, p. 241), or compulsory order of reference, or under any order referring the award back, must make his award under his hand, and (unless such submission or order contain a different limit of time) within three months after his appointment and entry on the reference, or being called upon to act by a notice in writing from any party; the parties, however, may, by consent in writing, enlarge the term for making the award. If the arbitrator make his award after the time limited for that purpose, or after the enlarged time (if the time have been enlarged), the award will be void. Where the reference is to several joint arbitrators, they must all join in making the award, as the parties are entitled to their joint judgment, and it seems they should execute it at the same time, and in the presence of each other.

The award.

As to the form of an award, no particular form of words is necessary: where an enlargement has been made, it is as well to recite it, but this is not absolutely necessary. The award should be a final settlement of all the matters referred. Thus, if all matters in difference are referred, and

PART X. the arbitrator omits to decide one matter which has been brought before him, the award is bad. If an arbitrator by the submission has power to direct what he shall think fit to be done, he has power to direct mutual releases to be executed. He should only direct the releases to extend to the time of the submission.

Sometimes, by the terms of the submission, it is obligatory on the arbitrator, and sometimes he is to be at liberty to raise any question of law for the opinion of the court. By the Common Law Procedure Act, 1854, s. 5, the arbitrator, where the submission is or may be made a rule of court (*ante*, p. 241), may, if he think fit, and it is not provided to the contrary, state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the court. By R. M. V., 1854, Form 14, in a special case stated under the above enactment, the arbitrator must state whether the arbitration is under a compulsory reference or upon a reference by consent; in the former case the award must be entitled in the court and cause, and the rule or order of the court must be set forth; in the latter case, the terms of the reference relating to the submission being made a rule or order of court, must be set forth.

The arbitrator's power over the costs of the reference depends entirely upon the submission. When the costs are to abide the event, the arbitrator has no power over them. Where an action is referred, and the order of reference is silent as to costs, the arbitrator has power over the costs of the action, but not over the costs of the reference. But where no action is referred and the submission is silent about costs, the arbitrator has no power over the same. Where an arbitrator has a discretion to exercise upon the subject of costs, he may order either party to pay them, or each to pay a moiety or the like. An arbitrator, to whom a cause is referred, with all the powers of a judge at Nisi Prius, cannot give a certificate for the costs of a special jury, after he has published his award, without providing for them therein. The amount of his charges is examinable on taxation, he should therefore not fix his own fee in the award. If an arbitrator will not part with the award except upon the payment of a larger fee than he is entitled to, the excess paid may be recovered by action (*Fernley v. Branson*, 20 L. J. Q. B. 168; *Barnes v. Braithwaite*, 2 H. & N. 569). If the submission is one which can be made a rule of court (*ante*, p. 241), the arbitrator may, if there be a power to

award the costs of the reference and award, direct such costs to be taxed by the proper officer of the court. But an arbitrator cannot award costs to be taxed by any person except such proper officer; for this would be a delegation of his authority: the taxation of costs by the master being a ministerial act, but in any other person a judicial one. If the costs are to be in the discretion of the arbitrator *who is to ascertain the same*, he is bound to ascertain and determine them.

The award should be signed by the arbitrator, and stamped. Where a verdict is taken on a trial subject to the certificate of an arbitrator as to the amount of damages, the certificate does not require a stamp.

When the award is made, the arbitrator gives notice to the parties or to their solicitors when they have appeared before him by solicitors, that it is ready for delivery. An award is considered as published within the meaning of the 9 & 10 Will. 3, c. 15, s. 2, and within the meaning of the rule for regulating the time for making an application to set aside an award, from the time of giving this notice.

After the award is executed, the arbitrator's authority is determined, and he cannot correct a mistake in a material part of it, unless the matters are remitted back to him for the purpose, as mentioned presently. The award, if a good one, is final and conclusive between the parties. If an award be good in part, the performance of that part which is good may be enforced, provided it be final in itself and perfectly distinct from, and independent of, that part which is bad.

When the submission has been made a rule of court, and the arbitrator has awarded costs generally, with or without any express direction as to their being taxed by the master, he will tax the same in the usual way. By r. 170, H. T. 1853, the costs may be taxed though the time for setting aside the award has not elapsed. The costs must be taxed as between party and party, unless the arbitrator, having power so to do, has ordered that they be taxed in a different manner.

Taxation  
of costs  
awarded.

The court cannot set aside the award when the submission cannot be made a rule of court. But where the submission can be made a rule of court, and the award is bad, and can be enforced without action or application to the court, the court will set it aside. And in some cases the court will do so though the award can only be enforced by an action or by an application to the court. Thus they will do so in some such cases, where the arbitrator has been guilty of misconduct in the course of the proceedings under the refer-

Setting  
aside  
award.

PART X.   ence ; and for matters extrinsic, not appearing on the face of the award, which makes it defective. And in some such cases the court may set aside the award for a defect apparent on the face of it ; but in general it is unnecessary to move to set it aside for such a defect, as it cannot be enforced. The court, as a general rule, will not enter into an examination of the merits, upon an application to set aside an award, unless it appear manifestly from the merits that the arbitrator has acted dishonestly or corruptly ; for the parties having agreed to abide by his decision, must do so. Nor will the court set aside the award on the ground of the arbitrator having decided contrary to law, unless the mistake appear on the face of the award, or of another paper delivered with it, forming part of the award. Also, an award cannot be set aside on a mere suspicion of favour ; for instance, it cannot be set aside merely because the arbitrator is indebted to one of the parties, though the other party was ignorant of the fact, and objected as soon as he became aware of it. And the court will not set aside an award when the bad part is perfectly distinct from and independent of the residue. Also, in general, where there is a doubt as to the validity of an award, unless where it is capable of being enforced without action, the court will not set it aside, nor will an order be made for its performance, or an attachment granted, but the party will be left to his action. It is generally useless to move to set aside an award for a technical objection, as the court will, if application be made for that purpose, remit to the arbitrator the matter objected to for amendment, as presently mentioned. Many objections, which otherwise would be fatal to the award, may be waived by proceeding with the reference with a knowledge of the same or the like.

Where a verdict is taken on a trial by jury, and the action only is referred, and the arbitrator is put merely in the place of the jury, the motion to set aside the award should, in ordinary cases, be made within the time limited for a motion for a new trial. The general rule where on such a trial an action and all matters in difference are referred, or where the submission is by rule or order, or by agreement in writing containing a clause that it may be made a rule of court (*Smith v. Whitmore*, 33 L. J. Ch. 218), an application to set aside the award should be made before the last day of what before the Judicature Acts was the next term after the publication of the same (see 9 & 10 Will. 3, c. 15, s. 2) (a).

(a) See *The Governors of Christ's Hospital, Brecknock v. Martin*, 46 L. J. Q. B. 591 ; ante, p. 16.

By r. 169, H. T. 1853, a rule to show cause why an award should not be set aside must state the objections thereto. CHAP.  
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This rule, it seems, does not apply where an action only was referred (a). In such a case a rule nisi is not granted, but the application to set aside the award is made after notice of motion, as mentioned *ante*, p. 51. It is as well that this notice should state the objections to the award to be relied on.

The Common Law Procedure Act, 1854, s. 8, gives the court or a judge power, where the submission can be made a rule of court (*ante*, p. 241), to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the arbitrator, upon such terms as to costs and otherwise, as to the court or judge may seem proper. An application to refer back matters to an arbitrator must be made within the same time as an application to set aside the award. Remitting  
matters  
back to the  
arbitrator.

Where a verdict has been taken at a trial subject to a reference of the action, the award may be enforced by entering up judgment in the action. Where the submission is by or can be made a rule of court, the award may be enforced by action, and sometimes by execution or attachment. Where the submission cannot be made a rule of court, the only remedy is by action. When an award orders the payment of money, or the performance of any other act, in order to enforce the same by execution, as above mentioned, a summons should be taken out calling on the party ordered to pay the money or perform the act to show cause why he should not do so pursuant to the award; and if an order be made, it can be enforced in the same way as a judgment (O. 42, r. 20, *ante*, p. 161). An attachment will not be granted unless there has been a wilful disobedience, nor where it is doubtful whether the award is a good one, nor against certain privileged persons, as peers, &c. It seems an attachment may be applied for before the time has elapsed for setting aside the award. Enforcing  
award.

Before taking proceedings to enforce an award by attachment or execution, where the award cannot be enforced by entering up judgment in the action, the submission and all enlargements of the time for the making of the award (if the award was made within the enlarged time) must be made a rule of court—a copy of this rule,—of the allocatur where there is one—of the award—and of the power of attorney enabling the party making the

(a) If no action is pending a rule to shew cause is granted, see *ante*, p. 50.

**PART X.** demand of performance to do so (if any) must be personally served upon the party who has to perform the award, and he must at the same time be shown the originals. If there have been any enlargements of the time for making the award made by the arbitrator, and the award was made within such enlarged time, a notice of such facts should also be given to the party who has to perform the award. At the time of the service of the above documents, the party in whose favour the award is made (or some one authorised by him by power of attorney) should demand the payment of the money or the performance of the award. An affidavit should be made in support of the summons showing that the party is entitled to the order asked for, and that the necessary preliminaries to the making of the order have been complied with. The original award should be annexed or exhibited to the affidavit. It may be shown for cause against the making of the order that the award is bad on the face of it, but in general it cannot be shown that the same is bad for matters extrinsic.

As to execution, see *ante*, p. 161, and as to the proceedings on an attachment, see *ante*, p. 179.

If a verdict has been taken at a trial, subject to the award or certificate of an arbitrator, the successful party may enter up judgment without any motion for that purpose (*Lloyd v. Lewis*, 46 L. J. Q. B. 81), and sue out execution. If other matters besides those in difference in the action have been referred, the award as to such matters can only be enforced by action, or by attachment or execution after obtaining a judge's order as above mentioned, and not under the judgment in the action.



## PART XI.

## CHAPTER XXXIX.

## GENERAL CLAUSES IN JUDICATURE ACTS AND RULES.

By the Judicature Act, 1873, s. 1, this Act may be cited Title of for all purposes as the "Supreme Court of Judicature Act, Judicature 1873." Act, 1873.

By the Judicature Act, 1873, s. 91, the several rules of Rules of law enacted and declared by this Act are to be in force and law appli- receive effect in all courts in England, so far as the matters cable in to which such rules relate are respectively cognisable by inferior such courts. courts.

By Judicature Act, 1873, s. 98, when the great seal is in Provision commission, the Lords Commissioners shall represent the as to Great Lord Chancellor for the purposes of this Act, save that as to Seal being the presidency of the Court of Appeal, and the appointment in commis- or approval of officers, or the sanction to any order for the sion. removal of officers, or any other Act to which the concurrence or presence of the Lord Chancellor is hereby made necessary, the powers given to the Lord Chancellor by this Act may be exercised by the senior Lord Commissioner for the time being.

By Judicature Act, 1873, s. 99, from and after the com- Provision mencement of this Act, the counties palatine of Lancaster as to com- and Durham shall respectively cease to be counties palatine, mission in so far as respects the issue of commissions of assize, or other counties like commissions, but not further or otherwise; and all such palatine. commissions may be issued for the trial of all causes and matters within such counties respectively in the same manner in all respects as in any other counties of England and Wales.

By Judicature Act, 1873, s. 100, in the construction of Interpre- this Act, unless there is anything in the subject or context tation of repugnant thereto, the several words hereinafter mentioned terms. shall have, or include, the meanings following (that is to say):—

"Lord Chancellor" shall include Lord Keeper of the Great Seal.

"The High Court of Chancery" shall include the Lord Chancellor.

**PART XI.** "The Court of Appeal in Chancery" shall include the Lord Chancellor as a judge on rehearing or appeal.

"London Court of Bankruptcy" shall include the chief judge in bankruptcy.

"The Treasury" shall mean the Commissioners of Her Majesty's Treasury, for the time being, or any two of them.

"Rules of Court" shall include forms.

"Cause" shall include any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the crown.

"Suit" shall include action.

"Action" shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court, and shall not include a criminal proceeding by the crown.

"Plaintiff" shall include every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

"Petitioner" shall include every person making any application to the court, either by petition, motion, or summons, otherwise than as against any defendant.

"Defendant" shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings.

"Party" shall include every person served with notice of, or attending any proceeding, although not named on the record.

"Matter" shall include every proceeding in the court not in a cause.

"Pleading" shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter-claim of a defendant.

"Judgment" shall include decree.

"Order" shall include rule.

"Oath" shall include solemn affirmation and statutory declaration.

"Crown case reserved" shall mean such questions of law reserved in criminal trials as are mentioned in the Act of the 11 & 12 Vict. c. 78.

"Pension" shall include retirement and superannuation allowance.

"Existing" shall mean existing at the time appointed for the commencement of this Act. CHAP. XXXIX.

By Judicature Act, 1874, s. 2, the Judicature Act, 1873, except any provisions thereof directed to take effect on the passing of the said Act, commenced and came into operation on 1 Nov. 1875. Commencement of Judicature Act, 1873.

By Judicature Act, 1875, s. 1, this Act shall, so far as is consistent with the tenor thereof, be construed as one with the Supreme Court of Judicature Act, 1873 (in this Act referred to as the principal Act), and together with the principal Act may be cited as the Supreme Court of Judicature Acts, 1873 and 1875, and this Act may be cited separately as the Supreme Court of Judicature Act, 1875. Short title of Judicature Act, 1875.

By s. 2, this Act, except any provision thereof which is declared to take effect before the commencement of this Act, shall commence and come into operation on the 1st day of November, 1875, see Judicature Act, 1876, s. 24. Commencement of Act.

As to the power to make rules for regulating the practice, &c., of the court, see Judicature Act, 1875, ss. 16, 17, 18, 24, 25; Judicature Act, 1876, s. 17; and as to the fees to be taken, see s. 26. Making rules for practice, &c.

By Judicature Act, 1875, s. 21, save as by the principal Act or this Act, or by any rules of court, may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the courts whose jurisdiction is by the principal Act or this Act transferred to the said High Court, and to the said Court of Appeal respectively, under or by virtue of any law, custom, general order, or rules whatsoever, and which are not inconsistent with the principal Act or this Act, or with any rules of court, may continue to be used and practised, in the said High Court of Justice, and the said Court of Appeal respectively, in such and the like purposes, as those to which they would have been applicable, in the respective courts of which the jurisdiction is so transferred, if the principal Act and this Act had not passed (see s. 24). Saving of existing procedure when not inconsistent with this Act or Rules of Court.

## FIRST SCHEDULE TO JUDICATURE ACT, 1875.

### RULES OF COURT.

[Note.—Where no other provision is made by the Act or these Rules the present procedure and practice remain in force.]

By O. 19, r. 6, every pleading or other document required to be delivered to a party, or between parties, shall be delivered

Delivery of pleadings

**PART XI.** in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer.

and documents.

### ORDER LVI.

#### NOTICES AND PAPER, &c.

1. All notices required by these rules shall be in writing, unless expressly authorised by a court or judge to be given orally.

2. Proceedings required to be printed shall be printed on cream wove machine drawing foolscap folio paper, 19 lbs. per mill ream, or thereabouts, in pica type leaded, with an inner margin about three-quarters of an inch wide, and an outer margin about two inches and a half wide (see O. 5, 12 Aug. 1875, *post*, p. 256).

3. Any affidavit may be sworn to either in print or in manuscript, or partly in print and partly in manuscript.

### ORDER LVII.

#### TIME.

1. Where by these rules, or by any judgment or order given or made after the commencement of the Act, time for doing any act or taking any proceeding is limited by months, not expressed to be lunar months, such time shall be computed by calendar months.

2. Where any limited time less (*Re Gilbert*, 46 L. J. B. 80) than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time.

3. Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open (*Taylor v. Jones*, 45 L. J. C. P. 110; *Re Lambert*, 46 L. J. B. 89).

4. No pleadings shall be amended or delivered in the long vacation, unless directed by a court or a judge.

5. The time of the long vacation shall not be reckoned in the computation of the times appointed or allowed by these rules for filing, amending, or delivering any pleading, unless otherwise directed by a court or a judge. CHAP.  
XXXIX.

6. A court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

#### ORDER LIX.

Non-compliance with any of these rules shall not render the proceedings in any action void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit. Effect of  
non-com-  
pliance  
with rules.

#### ORDER LXII.

##### EXCEPTIONS FROM THE RULES. (a)

Nothing in these rules shall affect the practice or procedure in any of the following causes or matters :—

Criminal proceedings :

Proceedings on the Crown side of the Queen's Bench Division :

Proceedings on the revenue side of the Exchequer Division :

Proceedings for divorce or other matrimonial causes.

#### ORDER LXIII.

##### INTERPRETATION OF TERMS.

The provisions of the 100th (b) section of the Act shall apply to these rules.

In the construction of these rules, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned or referred to shall have or include the meanings following :—

“ Person ” shall include a body corporate or politic :

“ Probate actions ” shall include actions and other matters relating to the grant or recall of probate or of letters of administration other than common form business :

(a) See Judicature Act, 1875, s. 19.

(b) See this section, *ante*, p. 251.

## PART XI.

"Proper officer" shall, unless and until any rule to the contrary is made, mean an officer to be ascertained as follows:—

(a) Where any duty to be discharged under the Act or these rules is a duty which has heretofore been discharged by any officer, such officer shall continue to be the proper officer to discharge the same:

(b) Where any new duty is under the Act or these rules to be discharged, the proper officer to discharge the same shall be such officer, having previously discharged analogous duties, as may from time to time be directed to discharge the same, in the case of an officer of the Supreme Court, or the High Court of Justice, or the Court of Appeal, not attached to any division, by the Lord Chancellor, and in the case of an officer attached to any division, by the President of the division, and in the case of an officer attached to any judge, by such judge: "The Act" and "the said Act" shall respectively mean the Supreme Court of Judicature Act, 1873, as amended by this Act.

R. 12 AUGUST, 1875, O. 5.

Printing  
proceed-  
ings.

Where, pursuant to rules of court, any pleading, special case, petition of right, deposition, or affidavit, is to be printed, and where any printed or other office copy thereof is to be taken, the following regulations shall be observed:—

1. The party on whose behalf the deposition or affidavit is taken and filed is to print the same in the manner provided by rule 2 of order 56, in the first schedule to the Supreme Court of Judicature Act, 1875 (a).

2. To enable the party printing to print any deposition, the officer with whom it is filed shall on demand deliver to such party a copy written on draft paper on one side only.

3. The party printing shall, on demand in writing, furnish to any other party or his solicitor any number of printed copies not exceeding ten, upon payment therefor, at the rate of 1d. per folio for one copy, and  $\frac{1}{2}$ d. per folio for every other copy.

4. The solicitor of the party printing shall give credit for the whole amount payable by any other party for printed copies.

5. The party entitled to be furnished with a print shall not be allowed any charge in respect of a written copy unless the court or judge shall otherwise direct.

6. The party by or on whose behalf any deposition, affidavit, or certificate is filed, shall leave a copy with the officer

(a) *Ante*, p. 254.

with whom the same is filed, who shall examine it with the original, and mark it as an office copy, such copy shall be a copy printed as above provided where such deposition or affidavit is to be printed.

7. The party or solicitor who has taken any printed or written office copy of any deposition or affidavit is to produce the same upon every proceeding to which the same relates.

8. Where any party is entitled to a copy of any deposition, affidavit, proceeding, or document, filed or prepared by or on behalf of another party, which is not required to be printed, such copy shall be furnished by the party by or on whose behalf the same has been filed or prepared.

9. The party requiring any such copy, or his solicitor, is to make a written application to the party by whom the copy is to be furnished, or his solicitor, with an undertaking to pay the proper charges, and thereupon such copy is to be made and ready to be delivered at the expiration of twenty-four hours after the receipt of such request and undertaking, or within such other time as the court or judge may in any case direct, and is to be furnished accordingly upon demand and payment of the proper charges.

10. In the case of an *ex parte* application for an injunction or writ of *ne exeat regno*, the party making such application is to furnish copies of the affidavits upon which it is granted upon payment of the proper charges immediately upon the receipt of such written request and undertaking as aforesaid, or within such time as may be specified in such request, or may have been directed by the court.

11. It shall be stated in a note at the foot of every affidavit filed on whose behalf it is so filed, and such note shall be printed on every printed copy of an affidavit, or set of affidavits, and copied on every office copy and copy furnished to a party.

12. The name and address of the party or solicitor by whom any copy is furnished is to be indorsed thereon in like manner as upon proceedings in court, and such party or solicitor is to be answerable for the same, being a true copy of the original, or of an office copy of the original, of which it purports to be a copy, as the case may be.

13. The folios of all printed and written office copies, and copies delivered or furnished to a party, shall be numbered consecutively in the margin thereof, and such written copies shall be written in a neat and legible manner on the same paper as in the case of printed copies.

14. In case any party or solicitor who shall be required to furnish any such written copy as aforesaid shall either refuse

**PART XI.** or, for twenty-four hours from the time when the application for such copy has been made, neglect to furnish the same, the person by whom such application shall be made shall be at liberty to procure an office copy from the office in which the original shall have been filed, and in such case no costs shall be due or payable to the solicitor so making default in respect of the copy or copies so applied for.

15. Where, by any order of the court (whether of appeal or otherwise) or a judge, any pleading, evidence, or other document, is ordered to be printed, the court or judge may order the expense of printing to be borne and allowed, and printed copies to be furnished by and to such parties and upon such terms as shall be thought fit.

ORDER, 12TH AUGUST, 1875.

Meaning  
of folio.

A folio is to comprise 72 words, every figure comprised in a column being counted as one word.

RULE 1, 1ST DECEMBER, 1875.

Mode of  
citing  
rules.

The rules in the first schedule to the Supreme Court of Judicature Act, 1875, may be cited as "The Rules of the Supreme Court," and the additional rules of court made by order in council of the 12th day of August, 1875, may be cited as "The Rules of the Supreme Court (Costs)," and these rules may be cited as "The Rules of the Supreme Court, December, 1875," or each separate one of these rules may be cited as if it had been one of "The Rules of the Supreme Court," and had been numbered by the number of the order and rule mentioned in the margin.

Interpreta-  
tion of  
terms in  
Judicature  
Act, 1876.

By Judicature Act, 1876, s. 25, in this Act, if not inconsistent with the context, the following expressions have the meaning hereinafter respectively assigned to them, that is to say, "High judicial office" means any of the following offices; that is to say, the office of Lord Chancellor of Great Britain or Ireland, or of paid judge of the Judicial Committee of the Privy Council, or of judge of one of Her Majesty's superior courts of Great Britain and Ireland. "Superior Courts of Great Britain and Ireland" means and includes,—As to England, Her Majesty's High Court of Justice and Her Majesty's Court of Appeal, and the superior courts of law and equity in England as they existed before the constitution of Her Majesty's High Court of Justice; and as to Ireland, the superior courts of law and equity at Dublin; and as to Scotland, the Court of Session.

"Error" includes a writ of error or any proceedings in or by way of error.



# APPENDICES.

## APPENDIX (A.) (a)

### PART I.

#### FORMS OF WRITS OF SUMMONS, &c.

No. 1.

Title in  
full.

187 . [*Here put the letter and number.*]  
In the High Court of Justice. Between A.B. Plaintiff,  
Division. and  
C.D. and E.F. Defendants.

VICTORIA, by the grace of God, &c.

To C.D. of in the county of and E.F. of  
We command you, That within eight days after the service of  
this writ on you, inclusive of the day of such service, you do cause an  
appearance to be entered for you in the Division of our High  
Court of Justice in an action at the suit of A.B.; and take notice,  
that in default of your so doing the plaintiff may proceed therein, and  
judgment may be given in your absence. Witness, &c.

*Memorandum to be subscribed on the writ.*

N.B.—This writ to be served within (*twelve*) calendar months  
from the date thereof, or, if renewed, from the date of  
such renewal, including the day of such date, and not  
afterwards.

The defendant [*or defendants*] may appear hereto by entering  
an appearance [*or appearances*] either personally or by  
solicitor at the [ ] office at .

*Indorsements to be made on the writ before issue thereof.*

The plaintiff's claim is for, &c.

This writ was issued by E.F., of , solicitor for the said  
plaintiff, who resides at , or, this writ was issued by the  
plaintiff in person who resides at [*mention the city, town, or*  
*parish, and also the name of the street and number of the house of the*  
*plaintiff's residence, if any.*]

*Indorsement to be made on the writ after service thereof.*

This writ was served by X. Y. on L. M. [the defendant or one of the  
defendants], on Monday, the day of , 18 .  
(Signed) X. Y.

(a) The forms in this appendix are in Appendix A to Judicature Act,  
1875, and are here numbered as in such appendix.

## APPENDIX (A).

## No. 2.

*Writ for service out of the jurisdiction, or where notice in lieu of service is to be given out of the jurisdiction.*

187 . [*Here put the letter and number.*]  
In the High Court of Justice. Between A.B. Plaintiff,  
Division. and  
C.D. and E.F. Defendants.

VICTORIA, by the grace of God, &c.

To C.D. of

We command you, C.D., That within [*here insert the number of days directed by the Court or Judge ordering the service or notice*] after the service of this writ [*or notice of this writ, as the case may be*] on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Division of our High Court of Justice in an action at the suit of A.B.; and take notice, that in default of your so doing the plaintiff may (a) [by leave of the Court or a Judge] proceed therein, and judgment may be given in your absence. Witness, &c.

*Memoranda and Indorsements as in Form No. 1.*

*Indorsement to be made on the writ before the issue thereof.*

N.B.—*This writ is to be used where the Defendant or all the Defendants or one or more Defendant or Defendants is or are out of the jurisdiction.*

## No. 3.

*Notice of Writ in lieu of service to be given out of the jurisdiction.*

187 . [*Here put the letter and number.*]  
Between A.B. Plaintiff,  
and  
C.D., E.F., and G.H. Defendants.

To G.H. of

Take notice that A.B., of has commenced an action against you, G.H., in the Division of Her Majesty's High Court of Justice in England, by writ of that Court, dated the day of , A.D. 18 ; which writ is indorsed as follows [*copy in full the indorsements*], and you are required within days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said Court to the said action; and in default of your so doing, the said A.B. may (a) [by leave of the court or a judge] proceed therein, and judgment may be given in your absence.

You may appear to the said writ by entering an appearance personally or by your solicitor at the [ ] office at

(Signed) A.B. of &c.

or  
X.Y. of &c.  
Solicitor for A.B.

In the High Court of Justice.  
Division.

(a) Forms 2 & 3 are to be read as if the words "by leave of the court or a judge" were not therein (O. 26, June, 1876).

No. 5.

*Form of Memorandum for Renewed Writ.*

In the High Court of Justice.

Division.

Between *A.B.*, plaintiff,  
and  
*C.D.*, defendant.

Seal renewed writ of summons in this action indorsed as follows:—  
[*Copy original writ and the indorsements.*]

No. 6.

*Memorandum of Appearance.*187 . [*Here put the letter and number.*]

High Court of Justice.

[*Chancery*] Division.*A.B.*, v. *C.D.*, and others.

Enter an appearance for  
in this action.

Dated this                      day of

*X.Y.*,

Solicitor for the Defendant.

The place of business of *X.Y.* is

His address for service is

or [*C.D.*,

Defendant in person.

The address of *C.D.* is

His address for service is

The said defendant [requires, or, does not require] a statement of  
complaint to be filed and delivered.

No. 7.

[*Here put the letter and number.*]

In the High Court of Justice.

Queen's Bench (*or* Chancery, C.P., *or*, &c.) Division.

Between *A.B.*, plaintiff,  
and  
*C.D.*, and  
*E.F.*, defendants.

The defendant *C.D.* limits his defence to part only of the property  
mentioned in the writ in this action, that is to say, to the close called  
"the Big field."

Yours, &amp;c.

*G.H.*,Solicitor for the said defendant *C.D.*Mr. *X.Y.*, plaintiff's solicitor.

## PART II.

## SECTION II.

*Money Claims where no Special Indorsement under Order III.,  
Rule 6 (ante, p. 59).*

Goods sold.	The plaintiff's claim is .	l. for the price of goods sold. [ <i>This Form shall suffice whether the claim be in respect of goods sold and delivered, or of goods bargained and sold.</i> ]
Money lent.	The plaintiff's claim is	l. for money lent [ <i>and interest</i> ].
Several demands.	The plaintiff's claim is	l. whereof l. is for the price of goods sold, and l. for money lent, and for l. for interest.
Rent.	The plaintiff's claim is	l. for arrears of rent.
Salary, &c.	The plaintiff's claim is	l. for arrears of salary as a clerk [ <i>or as the case may be.</i> ]
Interest.	The plaintiff's claim is	l. for interest upon money lent.
General average.	The plaintiff's claim is	l. for a general average contribution.
Freight, &c.	The plaintiff's claim is	l. for freight and demurrage.
Tolls.	The plaintiff's claim is	l. for lighterage.
Penalties.	The plaintiff's claim is	l. for market tolls and stallage.
Bankers balance.	[ . . . ] The plaintiff's claim is	l. for penalties under the statute.
Fees, &c., as solicitors.	The plaintiff's claim is	l. for money deposited with the defendant as a banker.
Commission.	The plaintiff's claim is	l. for fees for work done [ <i>and</i> l. money expended] as a solicitor.
Medical attendance, &c.	The plaintiff's claim is	l. for commission earned as [ <i>state character, as auctioneer, cotton broker, &amp;c.</i> ].
Return of premium.	The plaintiff's claim is	l. for medical attendances.
Warehouse rent.	The plaintiff's claim is	l. for a return of premiums paid upon policies of insurance.
Carriage of goods.	The plaintiff's claim is	l. for the warehousing of goods.
Use and occupation of houses.	The plaintiff's claim is	l. for the carriage of goods by railway.
Hire of goods.	The plaintiff's claim is	l. for the use and occupation of a house.
Work done.	The plaintiff's claim is	l. for the hire of [ <i>furniture</i> ].
Board and lodging.	The plaintiff's claim is	l. for work done as a surveyor.
Schooling.	The plaintiff's claim is	l. for board and lodging.
Money received.	The plaintiff's claim is	l. for the board, lodging, and tuition of X.Y.
Fees of office.	The plaintiff's claim is	l. for money received by the defendant as solicitor [ <i>or factor, or collector, or, &amp;c.</i> ] of the plaintiff.
Money overpaid.	The plaintiff's claim is	l. for fees received by the defendant under colour of the office of .
	The plaintiff's claim is	l. for a return of money overcharged for the carriage of goods by railway.
	The plaintiff's claim is	l. for a return of fees overcharged by the defendant as

The plaintiff's claim is with the defendant as stakeholder.	l. for a return of money deposited	Return of Money by stakeholder
The plaintiff's claim is ant as stakeholder, and become payable to plaintiff.	l. for money entrusted to the defend-	Money won from stakeholder.
The plaintiff's claim is the defendant as agent of the plaintiff.	l. for a return of money entrusted to	Money entrusted to agent.
The plaintiff's claim is from the plaintiff by fraud.	l. for a return of money obtained	Money obtained by fraud.
The plaintiff's claim is defendant by mistake.	l. for a return of money paid to the	Money paid by mistake.
The plaintiff's claim is defendant for [ <i>work to be done, left undone; or, a bill to be taken up; not taken up, or, &amp;c.</i> ].	l. for a return of money paid to the	Money paid for consideration which has failed.
The plaintiff's claim is deposit upon shares to be allotted.	l. for a return of money paid as a	
The plaintiff's claim is his surety.	l. for money paid for the defendant as	Money paid by surety for defendant.
The plaintiff's claim is defendant.	l. for money paid for rent due by the	Rent paid.
The plaintiff's claim is [ <i>or indorsed</i> ] for the defendant's accommodation.	l. upon a bill of exchange accepted	Money paid on accommodation bill.
The plaintiff's claim is money paid by the plaintiff as surety.	l. for a contribution in respect of	Contribution by surety.
The plaintiff's claim is joint debt of the plaintiff and the defendant, paid by the plaintiff.	l. for a contribution in respect of a	By co-debtor.
The plaintiff's claim is shares, against which the defendant was bound to indemnify the plaintiff.	l. for money paid for calls upon	Money paid for calls.
The plaintiff's claim is	l. for money payable under an award.	Money payable under award.
The plaintiff's claim is life of X.Y., deceased.	l. upon a policy of insurance upon the	Life policy.
The plaintiff's claim is 1,000 <i>l.</i> , and interest.	l. upon a bond to secure payment of	Money bond.
The plaintiff's claim is Court, in the Empire of Russia.	l. upon a judgment of the	Foreign judgment.
The plaintiff's claim is defendant.	l. upon a cheque drawn by the de-	Bills of Exchange, &c.
The plaintiff's claim is [ <i>or drawn or indorsed</i> ] by the defendant.	l. upon a bill of exchange accepted	
The plaintiff's claim is [ <i>indorsed</i> ] by the defendant.	l. upon a promissory note made [ <i>or</i>	
The plaintiff's claim is acceptor, and against the defendant C.D. as drawer [ <i>or indorser</i> ] of a bill of exchange.	l. against the defendant A.B. as ac-	
The plaintiff's claim is the price of goods sold.	l. against the defendant as surety for	Surety.

	The plaintiff's claim is	<i>l.</i> against the defendant <i>A.B.</i> as principal, and against the defendant <i>C.D.</i> as surety, for the price of goods sold <i>[or arrears of rent, or for money lent, or for money received by the defendant A.B. as traveller for the plaintiffs, or, &amp;c.]</i>
<i>Del credere agent.</i>	The plaintiff's claim is	<i>l.</i> against the defendant as a <i>del credere agent</i> for the price of goods sold <i>[or as losses under a policy]</i> .
<i>Calls.</i>	The plaintiff's claim is	<i>l.</i> for calls upon shares.
<i>Waygoing crops, &amp;c.</i>	The plaintiff's claim is	<i>l.</i> for crops, tillage, manure <i>[or as the case may be]</i> left by the defendant as outgoing tenant of a farm.

## SECTION III.

*Indorsement for Costs, &c. [add to the above Forms].*

And *l.* for costs; and if the amount claimed be paid to the plaintiff or his solicitor within four days *[or if the writ is to be served out of the jurisdiction, or notice in lieu of service allowed, insert the time for appearance limited by the order]* from the service hereof, further proceedings will be stayed.

## SECTION IV.

*Damages and other Claims.*

<i>Agent, &amp;c.</i>	The plaintiff's claim is for damages for breach of a contract to employ the plaintiff as traveller. The plaintiff's claim is for damages for wrongful dismissal from the defendant's employment as traveller <i>[and l. for arrears of wages]</i> . The plaintiff's claim is for damages for the defendant's wrongfully quitting the plaintiff's employment as manager. The plaintiff's claim is for damages for breach of duty as factor <i>[or, &amp;c.]</i> of the plaintiff <i>[and l. for money received as factor, &amp;c.]</i>
<i>Apprentices.</i>	The plaintiff's claim is for damages for breach of the terms of a deed of apprenticeship of <i>X.Y.</i> to the defendant <i>[or plaintiff]</i> .
<i>Arbitration.</i>	The plaintiff's claim is for damages for non-compliance with the award of <i>X.Y.</i>
<i>Assault, &amp;c.</i>	The plaintiff's claim is for damages for assault <i>[and false imprisonment, and for malicious prosecution]</i> .
<i>By husband and wife.</i>	The plaintiff's claim is for damages for assault and false imprisonment of the plaintiff <i>C.D.</i>
<i>Against husband and wife.</i>	The plaintiff's claim is for damages for assault by the defendant <i>C.D.</i>
<i>Solicitor.</i>	The plaintiff's claim is for damages for injury by the defendant's negligence as solicitor of the plaintiff.
<i>Bailment.</i>	The plaintiff's claim is for damages for negligence in the custody of goods <i>[and for wrongfully detaining the same]</i> .
<i>Pledge.</i>	The plaintiff's claim is for damages for negligence in the keeping of goods pawned <i>[and for wrongfully detaining the same]</i> .
<i>Hire.</i>	The plaintiff's claim is for damages for negligence in the custody of furniture lent on hire <i>[or a carriage lent]</i> , <i>[and for wrongfully, &amp;c.]</i>
<i>Banker.</i>	The plaintiff's claim is for damages for wrongfully neglecting <i>[or refusing]</i> to pay the plaintiff's cheque.
<i>Bill.</i>	The plaintiff's claim is for damages for breach of a contract to accept the plaintiff's drafts.

The plaintiff's claim is upon a bond conditioned not to carry on Bond.  
the trade of a

The plaintiff's claim is for damages for refusing to carry the plain- Carrier.  
tiff's goods by railway.

The plaintiff's claim is for damages for refusing to carry the plain-  
tiff by railway.

The plaintiff's claim is for damages for breach of duty in and  
about the carriage and delivery of coals by railway.

The plaintiff's claim is for damages for breach of duty in and about  
the carriage and delivery of machinery by sea.

The plaintiff's claim is for damages for breach of charter-party of Charter-  
ship [*Mary*]. party.

The plaintiff's claim is for return of household furniture, or, &c., or Claim for  
their value, and for damages for detaining the same. return of  
goods ;  
damages.

The plaintiff's claim is for wrongfully depriving plaintiff of goods, Damages  
household furniture, &c. for de-  
priving  
of goods.  
Defama-  
tion.

The plaintiff's claim is for damages for libel.

The plaintiff's claim is for damages for slander.

The plaintiff's claim is in replevin for goods wrongfully distrained. Distress.

The plaintiff's claim is for damages for improperly distraining. Replevin.

[*This Form shall be sufficient whether the distress complained of be wrongful or excessive, or irregular, and whether the claim be for damages only, or for double value.*] Wrongful  
distress.

The plaintiff's claim is to recover possession of a house, No. in Ejectment.  
street, or of a farm called Blackacre, situate in the parish  
of in the county of

The plaintiff's claim is to establish his title to [*here describe prop-* To establish  
*erty*], and to recover the rents thereof. title and  
recover  
rents.

[*The two previous Forms may be combined.*]

The plaintiff's claim is for dower. Dower.

The plaintiff's claim is for damages for infringement of the plain- Fishery.  
tiff's right of fishing.

The plaintiff's claim is for damages for fraudulent misrepresenta- Fraud.  
tion on the sale of a horse [*or a business, or shares, or, &c.*].

The plaintiff's claim is for damages for fraudulent misrepresenta-  
tion of the credit of A.B.

The plaintiff's claim is for damages for breach of a contract of  
guarantee for A.B.

The plaintiff's claim is for damages for breach of a contract to in- Guarantee.  
demnify the plaintiff as the defendant's agent to distrain.

The plaintiff's claim is for a loss under a policy upon the ship Insurance.  
"Royal Charter," and freight or cargo [*or for return of premiums*].

[*This Form shall be sufficient whether the loss claimed be total or partial.*]

The plaintiff's claim is for a loss under a policy of fire insurance Fire insur-  
upon house and furniture. ance.

The plaintiff's claim is for damages for breach of a contract to in-  
sure a house.

The plaintiff's claim is for damages for breach of contract to keep Landlord  
a house in repair. and tenant.

The plaintiff's claim is for damages for breaches of covenants con-  
tained in a lease of a farm.

- Medical man.** The plaintiff's claim is for damages for injury to the plaintiff from the defendant's negligence as a medical man.
- Mischievous animal.** The plaintiff's claim is for damages for injury by the defendant's dog.
- Negligence.** The plaintiff's claim is for damages for injury to the plaintiff [*or, if by husband and wife, to the plaintiff, C.D.*] by the negligent driving of the defendant or his servants.  
The plaintiff's claim is for damages for injury to the plaintiff while a passenger on the defendant's railway by the negligence of the defendant's servants.  
The plaintiff's claim is for damages for injury to the plaintiff at the defendant's railway station, from the defective condition of the station.
- Lord Campbell's Act.** The plaintiff's claim is as executor of *A.B.* deceased, for damages for the death of the said *A.B.*, from injuries received while a passenger on the defendant's railway, by the negligence of the defendant's servants.
- Promise of marriage.** The plaintiff's claim is for damages for breach of promise of marriage.
- Quare impedit.** The plaintiff's claim is in *quare impedit* for
- Seduction.** The plaintiff's claim is for damages for the seduction of the plaintiff's daughter.
- Sale of goods.** The plaintiff's claim is for damages for breach of contract to accept and pay for goods.  
The plaintiff's claim is for damages for non-delivery [*or short delivery, or defective quality, or other breach of contract of sale*] of cotton [*or, &c.*].  
The plaintiff's claim is for damages for breach of warranty of a horse.
- Sale of Land.** The plaintiff's claim is for damages for breach of a contract to sell [*or purchase*] land.  
The plaintiff's claim is for damages for breach of a contract to let [*or take*] a house.  
The plaintiff's claim is for damages for breach of a contract to sell [*or purchase*] the lease, with goodwill, fixtures, and stock in trade of a public-house.  
The plaintiff's claim is for damages for breach of covenant for title [*or for quiet enjoyment, or, &c.*] in a conveyance of land.
- Trespass to land.** The plaintiff's claim is for damages for wrongfully entering the plaintiff's land and drawing water from his well [*or cutting his grass, or pulling down his timber, or pulling down his fences, or removing his gate, or using his road or path, or crossing his field, or depositing sand there, or carrying away gravel from thence, or carrying away stones from his river*].
- Support.** The plaintiff's claim is for damages for wrongfully taking away the support of plaintiff's land [*or house, or mine*].
- Way.** The plaintiff's claim is for damages for wrongfully obstructing a way [*public highway or a private way*].
- Water-course, &c.** The plaintiff's claim is for damages for wrongfully diverting [*or obstructing, or polluting, or diverting water from*] a watercourse.  
The plaintiff's claim is for damages for wrongfully discharging water upon the plaintiff's land [*or into the plaintiff's mine*].  
The plaintiff's claim is for damages for wrongfully obstructing the plaintiff's use of a well.



The plaintiff's claim is for damages for the infringement of the Pasture plaintiff's right of pasture.

[*This Form shall be sufficient whatever the nature of the right to pasture be.*]

The plaintiff's claim is for damages for obstructing the access of Light light to plaintiff's house.

The plaintiff's claim is for damages for the infringement of the Sporting plaintiff's right of sporting.

The plaintiff's claim is for damages for the infringement of the Patent plaintiff's patent.

The plaintiff's claim is for damages for the infringement of the Copyright plaintiff's copyright.

The plaintiff's claim is for damages for wrongfully using [*or imi- Trade-mark tating*] the plaintiff's trade mark.

The plaintiff's claim is for damages for breach of a contract to Work build a ship [*or to repair a house, &c.*]

The plaintiff's claim is for damages for breach of a contract to employ the plaintiff to build a ship, &c.

The plaintiff's claim is for damages to his house, trees, crops, &c., caused by noxious vapours from the defendant's factory [*or, &c.*]

The plaintiff's claim is for damages from nuisance by noise from Nuisance the defendant's works [*or stables, or, &c.*]

The plaintiff's claim is for damages for loss of the plaintiff's goods Innkeeper in the defendant's inn.

Add to Indorsement:—

And for a mandamus.

Mandamus.

Add to Indorsement:—

And for an injunction.

Injunction.

Add to Indorsement where claim is to land, or to establish title, or both.

And for mesne profits.

Mesne profits.

And for an account of rents or arrears of rent.

Arrears of rent.

And for breach of covenant for [*repairs*].

Breach of covenant.

## SECTION VII.

*Special Indorsements under Order III., Rule 6 (ante, p. 59).*

1. The plaintiff's claim is for the price of goods sold. The following are the particulars:—

1873—31st December—	£	s.	d.
Balance of account for butcher's meat to this date	35	10	0
1874—1st January to 31st March—			
Butcher's meat supplied . . . . .	74	5	0
	109	15	0
1874—1st February.—Paid . . . . .	45	0	0
Balance due . . . . .	£64	15	0

2. The plaintiff's claim is against the defendant *A.B.* as principal and against the defendant *C.D.* as surety, for the price of goods sold to *A.B.* The following are the particulars:—

1874—2nd February. Guarantee by <i>C.D.</i> of the price of woollen goods, to be supplied to <i>A.B.</i>			£	s.	d.
2nd February—To goods	.	.	47	15	0
3rd March—To goods	.	.	105	14	0
17th March—To goods	.	.	14	12	0
5th April—To goods	.	.	34	0	0
			£202 1 0		

3. The plaintiff's claim is against the defendant as maker of a promissory note. The following are the particulars :—

Promissory note for 250 <i>l.</i> , dated 1st January, 1874, made by defendant, payable four months after date.		£
Principal	.	250
Interest	.	

4. The plaintiff's claim is against the defendant *A.B.* as acceptor, and against the defendant *C.D.* as drawer, of a bill of exchange. The following are the particulars :—

Bill of exchange for 500 <i>l.</i> , dated 1st January, 1874, drawn by defendant <i>C.D.</i> upon and accepted by defendant <i>A.B.</i> payable three months after date.		£
Principal	.	500
Interest	.	

5. The plaintiff's claim is for principal and interest due upon a bond. The following are the particulars :—

Bond dated 1st January, 1873. Condition for payment of 100 <i>l.</i> on the 26th December, 1873.		£
Principal due	.	50
Interest	.	

6. The plaintiff's claim is for principal and interest due under a covenant. The following are the particulars :—

Deed dated	covenant to pay 100 <i>l.</i> and interest.	£
Principal due	.	80
Interest	.	

#### SECTION VIII.

##### *Indorsements of Character of Parties.*

**Executors.** The plaintiff's claim is as executor [*or administrator*] of *C.D.*, deceased, for, &c.

The plaintiff's claim is against the defendant *A.B.*, as executor, [*or, &c.*] of *C.D.*, deceased, for, &c.

The plaintiff's claim is against the defendant *A.B.*, as executor of *X.Y.*, deceased, and against the defendant *C.D.*, in his personal capacity, for, &c.

**By husband and wife, executrix.** The claim of the plaintiff *C.D.* is as executrix of *X.Y.* deceased, and the claim of the plaintiff *A.B.* as her husband, for

The claim of the plaintiff is against the defendant *C.D.*, as executrix of the defendant *C.D.*, deceased, and against the defendant *A.B.*, husband as her husband, for  
 Against  
 husband  
 and wife,  
 executrix.

The plaintiff's claim is as trustee under the bankruptcy of *A.B.*, for  
 Trustee in bank-  
 ruptcy.

The plaintiff's claim is against the defendant as trustee under the bankruptcy of *A.B.*, for

The plaintiff's claim is as [or the plaintiff's claim is against the defendant as] trustee under the will of *A.B.* [or under the settlement upon the marriage of *A.B.* and *X.Y.* his wife]. Trustees.

The plaintiff's claim is as public officer of the Bank, for Public officer.

The plaintiff's claim is against the defendant as public officer of the Bank, for

The plaintiff's claim is against the defendant *A.B.* as principal, and against the defendant *C.D.* as public officer of the Bank, as surety, for

The plaintiff's claim is against the defendant as heir-at-law of *A.B.* Heir and deceased. devisee.

The plaintiff's claim is against the defendant *C.D.* as heir-at-law, and against the defendant *E.F.* as devisee of lands under the will of *A.B.*

The plaintiff's claim is as well for the Queen as for himself, for Qui tam action.

## APPENDIX (B.) (a)

## FORM 1.

*Notice by Defendant to Third Party.*

187 . [Here put the letter and number.]  
 Notice filed , 187 .

In the High Court,  
 Queen's Bench Division.

Between *A.B.*, Plaintiff,  
 and  
*C.D.*, Defendant.

To Mr. *X.Y.*

Take notice that this action has been brought by the plaintiff against the defendant [as surety for *M.N.*, upon a bond conditioned for payment of 2,000*l.* and interest to the plaintiff.

(a) The forms in this Appendix are in the Appendix (B.) to the Judicature Act, 1875, and are here numbered as in that Appendix.

## APPENDIX (B).

The defendant claims to be entitled to contribution from you to the extent of one-half of any sum which the plaintiff may recover against him, on the ground that you are [his co-surety under the said bond, *or*, also surety for the said *M.N.*, in respect of the said matter, under another bond made by you in favour of the said plaintiff, dated the                      day of                      , A.D.                      ].

*Or* [as acceptor of a bill of exchange for 500*l.*, dated the                      day of                      , A.D.                      , drawn by you before and accepted by the defendant, and payable three months after date.

The defendant claims to be indemnified by you against liability under the said bill, on the ground that it was accepted for your accommodation.]

*Or* [to recover damages for a breach of a contract for the sale and delivery to the plaintiff of 1,000 tons of coal.

The defendant claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by him on your behalf and as your agent.]

And take notice that, if you wish to dispute the plaintiff's claim in this action as against the defendant *C.D.*, you must cause an appearance to be entered for you within eight days after service of this notice.

In default of your so appearing, you will not be entitled in any future proceeding between the defendant *C.D.* and yourself to dispute the validity of the judgment in this action, whether obtained by consent or otherwise.

(Signed) *E.T.*

*Or*,  
*X.Y.*,  
Solicitor for the defendant,  
*E.T.*

Appearance to be entered at

## FORM 2.

187 . [*Here put the letter and number.*]

In the High Court  
Queen's Bench Division.

Between *A.B.*, Plaintiff,  
and  
*C.D.*, Defendant.

The plaintiff confesses the defence stated in the paragraph of the defendant's statement of defence [*or*, of the defendant's further statement of defence].

## FORM 3.

187 . [*Here put the letter and number.*]

In the High Court of Justice,  
Division.

Between *A.B.*, Plaintiff,  
and  
*C.D.*, Defendant.

The particulars of the plaintiff's complaint herein, and of the relief and remedy to which he claims to be entitled, appear by the indorsement upon the writ of summons.

FORM 4.

"To the within-named X.Y.

"Take notice that if you do not appear to the within counter-claim of the within-named C.D. within eight days from the service of this defence and counter-claim upon you, you will be liable to have judgment given against you in your absence.

"Appearances are to be entered at

FORM 5.

*Notice of Payment into Court.*

In the High Court of Justice, 1875. B. No.  
Q.B. Division.

A.B. v. C.D.

Take notice that the defendant has paid into Court £ and says that that sum is enough to satisfy the plaintiff's claim [or the plaintiff's claim for, &c.]

To Mr. X.Y.,  
the Plaintiff's Solicitor.

Z.,  
Defendant's Solicitor.

FORM 6.

*Acceptance of Sum paid into Court.*

In the High Court of Justice, 1875. B. No.  
Q.B. Division.

A.B. v. C.D.

Take notice that the plaintiff accepts the sum of £ paid by you into Court in satisfaction of the claim in respect of which it is paid in.

FORM 7.

*Form of Interrogatories.*

In the High Court of Justice, 1874. B. No.  
Division.

Between A.B., Plaintiff,  
and

C.D., E.F., and G.H., Defendants.

Interrogatories on behalf of the above-named [plaintiff, or defendant C.D.] for the examination of the above-named [defendants E.F. and G.H., or plaintiff].

1. Did not, &c.

2. Has not, &c.

&c. &c. &c.

[The defendant E.F. is required to answer the interrogatories numbered .]

[The defendant G.H. is required to answer the interrogatories numbered .]

## APPENDIX (B).

## FORM 8.

*Form of Answer to Interrogatories.*

In the High Court of Justice,  
Division.

1874. B. No.

Between *A.B.*, Plaintiff,  
and  
*C.D.*, *E.F.*, and *G.H.*, Defendants.

The answer of the above-named defendant *E.F.* to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named *E.F.*, make oath and say as follows :—

.....  
.....

## FORM 9.

*Form of Affidavit as to Documents.*

In the High Court of Justice,  
Division.

1874. B. No.

Between *A.B.*, Plaintiff,  
and  
*C.D.*, Defendant.

I, the above-named defendant *C.D.*, make oath and say as follows :—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. That [*here state upon what grounds the objection is made, and verify the facts as far as may be*].

4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

5. The last-mentioned documents were last in my possession or power on [*state when*].

6. That [*here state what has become of the last-mentioned documents, and in whose possession they now are*].

7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

## FORM 10.

*Form of Notice to produce Documents.*

In the High Court of Justice,  
Q.B. Division.

*A.B. v. C.D.*

Take notice that the [plaintiff or defendant] requires you to produce for his inspection the following documents referred to in your [statement of claim, or defence, or affidavit, dated the day of A.D. ]

*Describe documents required.*

*X. Y.,*

To Z., Solicitor to the  
Solicitor for

---

## FORM 11.

*Form of Notice to inspect Documents.*

In the High Court of Justice,  
Q.B. Division.

*A.B. v. C.D.*

Take notice that you can inspect the documents mentioned in your notice of the day of A.D. [except the deed numbered in that notice] at my office on Thursday next the instant, between the hours of 12 and 4 o'clock.

Or, that the [plaintiff or defendant] objects to giving you inspection of the documents mentioned in your notice of the day of A.D. , on the ground that [state the ground] :—

---

## FORM 12.

*Form of Notice to admit Documents.*

In the High Court of Justice,  
Division.

*A.B. v. C.D.*

Take notice that the plaintiff [or defendant] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [or plaintiff], his solicitor or agent, at , on between the hours of ; and the defendant [or plaintiff] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all

## APPENDIX (B).

just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, &c.

To *E.F.*, solicitor [*or agent*] for defendant [*or plaintiff*].

*G.H.*, solicitor [*or agent*] for plaintiff [*or defendant*].

[*Here describe the documents, the manner of doing which may be as follows :—*]

## ORIGINALS.

Description of Documents.	Dates.
Deed of covenant between <i>A.B.</i> and <i>C.D.</i> first part, and <i>E.F.</i> second part - - - - -	January 1, 1848.
Indenture of lease from <i>A.B.</i> to <i>C.D.</i> - - - - -	February 1, 1848.
Indenture of release between <i>A.B.</i> , <i>C.D.</i> first part, &c. - - -	February 2, 1848.
Letter—defendant to plaintiff - - - - -	March 1, 1848.
Policy of insurance on goods by ship " <i>Isabella</i> ," on voyage from Oporto to London - - - - -	December 3, 1847.
Memorandum of agreement between <i>C.D.</i> , captain of said ship, and <i>E.F.</i> - - - - -	January 1, 1848.
Bill of exchange for 100 <i>l.</i> at three months, drawn by <i>A.B.</i> on and accepted by <i>C.D.</i> , indorsed by <i>E.F.</i> and <i>G.H.</i> - - -	May 1, 1849.

## COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.
Register of baptism of <i>A.B.</i> in the parish of <i>X.</i> - - - - -	January 1, 1848.	Sent by General Post, February 2, 1848. Served March 2, 1848, on defendant's attorney by <i>E.F.</i> of—
Letter—plaintiff to defendant - - - - -	February 1, 1848. -	
Notice to produce papers - - - - -	March 1, 1848 -	
Record of a Judgment of the Court of Queen's Bench in an action, <i>J.S. v. J.N.</i> - - - - -	Trinity Term, 10th Vic.	
Letters Patent of King Charles II. in the Rolls Chapel. - - - - -	January 1, 1680.	

## FORM 13.

*Setting down Special Case.*

1875. B. No.

In the High Court of Justice,  
Division.

Between *A.B.*, Plaintiff,  
and  
*C.D.* and others, Defendants.

Set down for argument the special case filed in this action on the day of , 187 .

*X.Y.*, Solicitor for



## FORM 14.

*Form of Notice of Trial.*

In the High Court of Justice,  
Division.

*A.B. v. C.D.*

Take notice of trial of this action [*or of the issues in this action ordered to be tried*] by a judge and jury [*or as the case may be*] in Middlesex [*or as the case may be*] for the day of next.

*X.Y.*, plaintiff's Solicitor [*or as the case may be*].

Dated

To *Z.*, defendant's Solicitor [*or as the case may be*].

## FORM 15.

*Form of Certificate of Officer after Trial by a Jury.*

30th November 1876.

1867. No. .

In the High Court of Justice,  
Division.

Between *A.B.*, Plaintiff,  
and  
*C.D.*, Defendant.

I certify that this action was tried before the Honourable Mr. Justice and a special jury of the county of on the 12th and 13th days of November 1876.

The jury found [*state findings*].

The judge directed that judgment should be entered for the plaintiff for *l.* with costs of summons [*or as the case may be*].

*A.B.*

[Title of Officer.]

## APPENDIX (C.) (a)

## No. 1.

187 . B. No. ACCOUNT  
STATED.

In the High Court of Justice,  
Division.

Writ issued 3rd August 1875.

Between *A.B.* . . . . Plaintiff,  
and  
*E.F.* . . . . Defendant.

*Statement of Claim.*

1. Between the 1st of January and the 28th of February 1875, the Claim. plaintiff supplied to the defendant various articles of drapery; and

(a) The Forms in this Appendix are in Appendix (C.) to the Judicature Act, 1875, and are here numbered as in that Appendix.

accounts and invoices of the goods so supplied, and their prices, were from time to time furnished to the defendant, and payments on account were from time to time made by the defendant.

2. On the 28th of February 1875, a balance remained due to the plaintiff of 75*l.* 9*s.*, and an account was on that day sent by the plaintiff to the defendant showing that balance.

3. On the 1st of March following, the plaintiff's collector saw the defendant at his house, and asked for payment of the said balance, and the defendant then paid him by cheque 25*l.* on account of the same. The residue of the said balance, amounting to 50*l.* 9*s.*, has never been paid.

The plaintiff claims

*l.*

The plaintiff proposes that this action should be tried in the county of Northampton.

---

No. 5.

AGENT. In the High Court of Justice,  
Division.

187 . B. No.

Writ issued 3rd August 1875.

Between A.B. and Company . . . Plaintiffs,  
and  
E.F. and Company . . . Defendants.

*Statement of Claim.*

Claim.

1. The plaintiffs are manufacturers of artificial manures, carrying on business at , in the county of .

2. The defendants are commission agents, carrying on business in London.

3. In the early part of the year , the plaintiffs commenced, and down to the 187 , continued to consign to the defendants, as their agents, large quantities of their manures for sale, and the defendants sold the same, and received the price thereof and accounted to the plaintiffs therefor.

4. No express agreement has ever been entered into between the plaintiffs and the defendants with respect to the terms of the defendants' employment as agents. The defendants have always charged the plaintiffs a commission at per cent. on all sales effected by them, which is the rate of commission ordinarily charged by *del credere* agents in the said trade. And the defendants, in fact, always accounted to the plaintiffs for the price, whether they received the same from the purchasers or not.

5. The plaintiffs contend that the defendants are liable to them as *del credere* agents, but if not so liable are under the circumstances hereinafter mentioned liable as ordinary agents.

6. On the , the plaintiffs consigned to the defendants for sale a large quantity of goods, including tons of .

7. On or about the , the defendants sold tons of part of such goods to one G.H. for , at three months' credit, and delivered the same to him.

8. G.H. was not, at that time, in good credit and was in insolvent circumstances, and the defendants might, by ordinary care and diligence, have ascertained the fact.

9. *G.H.* did not pay for the said goods, but before the expiration of the said three months for which credit had been given was adjudicated a bankrupt, and the plaintiffs have never received the said sum of £. or any part thereof.

The plaintiffs claim :—

1. Damages to the amount of £.
2. Such further or other relief as the nature of the case may require.

The plaintiffs propose that this action should be tried in the county of .

[Title as in claim, omitting date of issue of writ.]

*Statement of Defence.*

1. The defendants deny that the said commission of per cent. Defence. mentioned in paragraph 4 of the claim is the rate of commission ordinarily charged by *del credere* agents in the said trade, and say that the same is the ordinary commission for agents other than *del credere* agents, and they deny that they ever accounted to the plaintiffs for the price of any goods, except after they had received the same from the purchasers.

2. The defendants deny that they were ever liable to the plaintiffs as *del credere* agents.

3. With respect to the eighth paragraph of the plaintiffs' statement of claim, the defendants say that at the time of the said sale to the said *G.H.*, the said *G.H.* was a person in good credit. If it be true that the said *G.H.* was then in insolvent circumstances (which the defendants do not admit), the defendants did not and had no reason to suspect the same, and could not by ordinary care or diligence have ascertained the fact.

[Title as in defence.]

*Reply.*

The plaintiffs join issue upon the defendants' statement of defence. Reply.

No. 6.

In the High Court of Justice,  
Division.

187 . B. No. BILL OF  
EXCHANGE.

Writ issued 3rd August 1876.

Between *A.B.* and *C.D.* . . . . Plaintiffs,  
and  
*E.F.* and *G.H.* . . . . Defendants.

*Statement of Claim.*

1. Messrs. *M.N. & Co.* on the day of drew a Claim. bill of exchange upon the defendants for £. payable to the order of the said Messrs. *M.N. & Co.* three months after date, and the defendants accepted the same.

2. The bill became due on the , and the defendants have not paid it.

The plaintiffs claim :—

[Title.]

*Statement of Defence.***Defence.**

1. The bill of exchange mentioned in the statement of claim was drawn and accepted under the circumstances herein-after stated, and except as hereinafter mentioned there never was any consideration for the acceptance or payment thereof by the defendants.

2. Shortly before the acceptance of the said bill it was agreed between the said Messrs. *M.N. & Co.*, the drawers thereof, and the defendants, that the said Messrs. *M.N. & Co.* should sell and deliver to the defendants free on board ship at the port of \_\_\_\_\_, 1,200 tons of coals during the month of \_\_\_\_\_, and that the defendants should pay for the same by accepting the said Messrs. *M.N. & Co.*'s draft for \_\_\_\_\_ l. at six months.

3. The said Messrs. *M.N. & Co.* accordingly drew upon the defendants, and the defendants accepted the bill of exchange now sued upon.

4. The defendants did all things which were necessary to entitle them to delivery by the said Messrs. *M.N. & Co.* of the said 1,200 tons of coal under their said contract, and the time for delivery has long since elapsed; but the said Messrs. *M.N. & Co.* never delivered the same, or any part thereof, but have always refused to do so, whereby the consideration for the defendants' acceptance has wholly failed.

5. The plaintiffs first received the said bill, and it was first indorsed to them after it was overdue.

6. The plaintiffs never gave any value or consideration for the said bill.

7. The plaintiffs took the said bill with notice of the facts stated in the second, third, and fourth paragraphs hereof.

[Title.]

*Reply.***Reply.**

1. The plaintiff joins issue upon the defendants' statement of defence.

2. The plaintiff gave value and consideration for the said bill in manner following, that is to say, on the \_\_\_\_\_ day of \_\_\_\_\_ 187\_\_\_\_, the said Messrs. *M.N. & Co.* were indebted to the plaintiff in about \_\_\_\_\_ l., the balance of an account for goods sold from time to time by him to them. On that day they ordered of the plaintiff further goods to the value of about \_\_\_\_\_ l., which last-mentioned goods have since been delivered by him to them. And at the time of the order for such last-mentioned goods it was agreed between Messrs. *M.N. & Co.* and the plaintiff, and the order was received upon the terms, that they should indorse and hand over to him the bill of exchange sued upon, together with various other securities on account of the said previous balance, and the price of the goods so ordered on that day. The said securities, including the bill sued upon, were thereupon on the same day indorsed and handed over to the plaintiff.

. No. 7.

187 . B. No.

In the High Court of Justice,  
Division.BILL OF  
EXCHANGE  
AND CON-  
SIDERATION.

Writ issued 3rd August 1876.

Between *A.B.* and *C.D.* . . . Plaintiffs,  
and  
*E.F.* and *G.H.* . . . Defendants.

*Statement of Claim.*

1. The plaintiffs are merchants, factors, and commission Claim. agents, carrying on business in London.

2. The defendants are merchants and commission agents, carrying on business at Hong Kong.

3. For several years prior to the 1875, the plaintiffs had been in the habit of consigning goods to the defendants for sale, as their agents, and the defendants had been in the habit of consigning goods to the plaintiffs for sale, as their agents; and each party always received the price of the goods sold by him for the other; and a balance was from time to time struck between the parties, and paid.

On the of , the moneys so received by the defendants for the plaintiffs, and remaining in their names, largely exceeded the moneys received by the plaintiffs for the defendants, and a balance of £. was accordingly due to the plaintiffs from the defendants.

4. On or about the 1875, the plaintiffs sent to the defendants a statement of the accounts between them, showing the said sum as the balance due to the plaintiffs from the defendants; and the defendants agreed to the said statement of accounts as correct, and to the said sum of £. as the balance due by them to the plaintiffs, and agreed to pay interest on such balance if time were given to them.

5. The defendants requested the plaintiffs to give them three months time for payment of the said sum of £., and the plaintiffs agreed to do so upon the defendants accepting the bills of exchange hereinafter mentioned.

6. The plaintiffs thereupon on the drew two bills of exchange upon the defendants, one for £. and the other for £., both payable to the order of the plaintiffs three months after date, and the defendants accepted the bills.

The said bills became due on the 187 , and the defendants have not paid the bills, or either of them, nor the said sum of £.

The plaintiffs claim :—

£. and interest to the date of judgment.

The plaintiffs propose that the action should be tried in London.

No. 8.

In the High Court of Justice,  
Division.

187 . B. No.

Writ issued [ ].

[THE "IDA." ](a)

Between A.B. and C.D. . . . Plaintiffs,  
and  
E.F. and G.H. . . . Defendants.

*Statement of Claim.*

Claim.

[1. The "Ida" is a vessel of which no owner or part owner was, at the time of the institution of this cause, domiciled in England or Wales.] (b)

2. In the month of February 1873, Messrs. L. and Company, of Alexandria, caused to be shipped 6,110 ardebs of cotton seed on board the said vessel, then lying in Port Said (Egypt), and the then master of the vessel received the same, to be carried from Port Said to Hull, upon the terms of three bills of lading, signed by the master, and delivered to Messrs. L. and Company.

3. The three bills of lading, being in form exactly similar to one another, were and are, so far as is material to the present case in the words, letters, and figures following, that is to say :—

"Shipped in good order and well conditioned by L. & Co. Alexandria (Egypt) in and upon the good ship called the 'Ida,' whereof is master for the present voyage Ambrozio Chiapella, and now riding at anchor in the port of Port Said (Egypt) and bound for Hull, six thousand one hundred and ten ardebs cotton seed being marked and numbered as in the margin, and are to be delivered in the like good order and well-conditioned at the aforesaid Port of Hull (the act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, save risk of boats so far as ships are liable thereto excepted), unto order or to assigns paying freight for the said goods at the rate of (19s.) say nineteen shillings sterling in full per ton of 20 cwt. delivered with 10% gratuity. Other conditions as per charter-party, dated London, 4th October 1872, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading all of this tenor and date, the one of which three bills being accomplished the other two to stand void. Dated in Port Said (Egypt) 6th February 1873. 100 dunnage mats. Fifteen working days remain for discharging."

4. The persons constituting the firm of Messrs. L. and Company are identical with the members of the plaintiffs' firm.

5. The vessel sailed on her voyage to Hull, and duly arrived there on or about the 7th day of May 1873.

6. The cotton seed was delivered to the plaintiffs but not in as good

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(a) In Admiralty action insert name of ship.

(b) A statement to this effect may be inserted if the action be under sect. 6 of the Admiralty Act, 1861.

order and condition as it was in when shipped at Port Said ; but was delivered to the plaintiffs greatly damaged.

7. The deterioration of the cotton seed was not occasioned by any of the perils or causes in the bills of lading excepted.

8. By reason of the premises the plaintiffs lost a great part of the value of the said cotton seed, and were put to great expense in and about keeping, warehousing, and improving the condition of the said cotton seed, and in and about having the same surveyed.

The plaintiffs claim the following relief :—

1. For damages, [(a) and the condemnation of the said vessel and the defendant and his bail in the same]:
2. Such further relief as the nature of the case requires.

[Title.]

*Statement of Defence.*

1. They deny the truth of the allegations contained in the sixth, Defence. seventh, and eighth articles of the said petition.

2. The deterioration, if any, to the cotton seed was occasioned by the character and quality of the cotton seed when shipped on board the "Ida," and by the inherent qualities of the cotton seed, and by shipping water in a severe storm which occurred on the day of \_\_\_\_\_ in latitude \_\_\_\_\_ during the voyage, or by some or one of such causes.

[Title.]

*Reply.*

**The plaintiffs join issue upon the statement of defence.**

**Reply.**

**No. 10.**

In the High Court of Justice,  
Division.

187 . B. No.

Writ issued 3rd August 1876.

## CHARTER-PARTY.

Between *A.B.* and *C.D.* . . . Plaintiffs,

and

*E.F. and G.H.* . . . Defendants.

*Statement of Claim.*

1. The plaintiffs were, on the 1st August 1874, the owners of the steamship "British Queen."

2. On the 1st August 1874, the ship being then in Calcutta, a charter-party was there entered into between John Smith, the master, on behalf of himself and the owners of the said ship, of the one part, and the defendants of the other part.

**Claim.**

3. By the said charter-party it was agreed, amongst other things, that the defendants should be entitled to the whole carrying power of the said steamship for the period of four months certain, com-

(a) This may be inserted if the action be an Admiralty action in rem.

mening from the said 1st August 1874, upon a voyage or voyages between Calcutta and Mauritius and back; that the defendants should pay for such use of the said steamship to the plaintiffs' agents at Calcutta monthly, the sum of 1,000*l.*; that the charter should terminate at Calcutta; and that if at the expiration of the said period of four months the said steamship should be upon a voyage, then the defendants should pay *pro ratâ* for the hire of the ship up to her arrival at Calcutta, and the complete discharge of her cargo there.

4. The "British Queen" made several voyages in pursuance of the said charter-party, and the first three monthly sums of 1,000*l.* each were duly paid.

5. The period of four months expired on the 1st December 1874, and at that time the steamship was on a voyage from Mauritius to Calcutta. She arrived at Calcutta on the 13th December, and the discharge of her cargo there was completed on the 16th December 1874.

6. The plaintiffs' agents at Calcutta called upon the defendants to pay to them the fourth monthly sum of 1,000*l.*, and the sum of 500*l.*, for the hire of the steamship from the 1st to the 16th December 1874, but the defendants have not paid any part of the said sums.

The plaintiffs' claim :—

The sum of 1,500*l.*, and interest upon 1,000*l.*, part thereof, from the 1st December 1874, until judgment.

The plaintiffs propose that this action should be tried in London.

[Title.]

#### *Statement of Defence.*

#### **Defence.**

1. By the charter-party sued upon it was expressly provided that if any accident should happen to, or any repairs should become necessary to the engines or boilers of the said steamship, the time occupied in repairs should be deducted from the period of the said charter, and a proportionate reduction in the charter money should be made.

2. On the repairs became necessary to the engines and boilers of the steamship, and ten days were occupied in effecting such repairs.

3. On the an accident happened to the engines of the steamship at Mauritius, and two days were occupied in effecting the repairs necessary in consequence thereof.

4. The defendants are therefore entitled to the reduction in the charter money of 400*l.*

#### **Counter-claim.**

By way of set-off and counter-claim the defendants claim as follows :—

5. By the charter-party it was expressly provided that the charterers should furnish funds for the steamship's necessary disbursements, except in the port of Calcutta, without any commission or interest on any sum so advanced.

6. The defendants paid for the necessary disbursements of the ship in the port of Mauritius between and the 1874, sums amounting in all to 625*l.* 14*s.* 6*d.*

7. The charter-party also contained an express warranty that the steamship was at the date thereof capable of steaming nine knots an hour on a consumption of 30 tons of coal a day, and it was further provided by the charter-party that the charterers should provide coal for the use of the said steamship.

8. The steamship was at the date of the charter-party only capable



of steaming less than eight knots to an hour, and that only on a consumption of more than 35 tons of coal a day.

9. In consequence of the matters mentioned in the last paragraph, the steamship finally arrived at Calcutta at least 15 days later, and remained under charter at least 15 days longer than she would otherwise have done. She was also during the whole period of the said charter at sea for a much larger number of days than she would otherwise have been, and consumed a much larger quantity of coal on each of such days than she would otherwise have done, whereby the defendants were obliged to provide for the use of the steamship much larger quantities of coal than they would otherwise have been.

The defendants claim—

1. damages in respect of the matters stated in this set-off and counter-claim.

[Title.]

*Reply.*

1. The plaintiffs join issue upon the second, third, and fourth paragraphs of the defendants' statement of defence.

2. With respect to the alleged set-off stated in paragraph 6 the plaintiffs do not admit the correctness of the amount therein stated. And all sums advanced by them for disbursements were paid or allowed to them by the plaintiffs by deducting the amount thereof from the third monthly sum of 1,000*l.* paid (subject to such deduction) to the plaintiffs' agents at Calcutta by the defendants on or about the 12th November 1874.

3. With respect to the alleged breach of warranty and the alleged damages therefrom stated in the 7th, 8th, and 9th paragraphs, the plaintiffs say that the steamship was at the date of the charter-party capable of steaming nine knots an hour on a consumption of 30 tons of coal a day. If the steamship did not, during the said charter, steam more than eight knots an hour, and that on a consumption of more than 35 tons a day, as alleged (which the plaintiffs do not admit), it was in consequence of the bad and unfit quality of the coals provided by the defendants for the ship's use.

[Title.]

*Joinder of issue.*

The defendants join issue upon the plaintiffs' reply to their set-off and counter-claim.

No. 13.

In the High Court of Justice,  
Division.

187 . B. No.

FALSE  
IMPRISON-  
MENT.

Writ issued 3rd August 1876.

Between *A.B.* . . . . Plaintiff,  
and  
*E.F.* . . . . Defendant.

*Statement of Claim.*

1. The plaintiff is a journeyman painter. The defendant is a Claim-builder, having his building yard, and carrying on business at

and for six months before and up to the 22nd August 187 the plaintiff was in the defendant's employment as a journeyman painter.

2. On the said 22nd August 187 , the plaintiff came to work as usual in the defendant's yard, at about six o'clock in the morning.

3. A few minutes after the plaintiff had so come to work the defendant's foreman X.Y., who was then in the yard, called the plaintiff to him, and accused the plaintiff of having on the previous day stolen a quantity of paint, the property of the defendant, from the yard. The plaintiff denied the charge, but X.Y. gave the plaintiff into the custody of a constable, whom he had previously sent for, upon a charge of stealing paint.

4. The defendant was present at the time when the plaintiff was given into custody, and authorised and assented to his being so given into custody; and in any case X.Y., in giving him into custody, was acting within the scope and in the course of his employment as the defendant's foreman, and for the purposes of the defendant's business.

5. The plaintiff upon being so given into custody, was taken by the said constable a considerable distance through various streets, on foot to the police station, and he was there detained in a cell till late in the same afternoon, when he was taken to the police court, and the charge against him was heard before the magistrate then sitting there, and was dismissed.

6. In consequence of being so given into custody, the plaintiff suffered annoyance and disgrace, and loss of time and wages, and loss of credit and reputation, and was thereby unable to obtain any employment or earn any wages for three months.

The plaintiff claims £ damages.

The plaintiff proposes that this action should be tried in Middlesex.

[Title.]

#### *Statement of Defence.*

Defence.

1. The defendant denies that he was present at the time when the plaintiff was given into custody, or that he in any way authorised or assented to his being given into custody. And the said X.Y., in giving the plaintiff into custody, did not act within the scope or in the course of his employment as the defendant's foreman, or for the purposes of the defendant's business.

2. At some time about five or six o'clock on the being the evening before the plaintiff was given into custody, a large quantity of paint had been feloniously stolen by some person or persons from a shed upon the defendant's yard and premises.

3. At about 5.30 o'clock on the evening of the the plaintiff, who had left off work about half an hour previously, was seen coming out of the shed when no one else was in it, although his work lay in a distant part of the yard from and he had no business in or near the shed. He was then seen to go to the back of a stack of timber in another part of the yard. Shortly afterwards the paint was found to have been stolen, and it was found concealed at the back of the stack of timber behind which the plaintiff had been seen to go.

4. On the following morning, before the plaintiff was given into custody, he was asked by X.Y. what he had been in the shed and behind the stack of timber for, and he denied having been in either place. X.Y. had reasonable and probable cause for suspecting, and

**[Title.]**

The plaintiff joins issue upon the defendant's statement of defence. Reply.

187 . B. No. FRAUD.

Between A.B. . . . . Plaintiff,  
and  
E.F., . . . . Defendant.

1. In or about March 1875 the defendant caused to be inserted in the Daily Telegraph Newspaper an advertisement, in which he offered for sale the lease, fixtures, fittings, goodwill, and stock-in-trade of a baker's shop and business, and described the same as an increasing business, and doing 12 sacks a week. The advertisement directed application for particulars to be made to X. Y.

2. The plaintiff having seen the advertisement applied to X.Y., who placed him in communication with the defendant, and negotiations ensued between the plaintiff and the defendant for the sale to the plaintiff of the defendant's bakery at \_\_\_\_\_ with the lease, fixtures, fittings, stock-in-trade, and goodwill.

3. In the course of these negotiations the defendant repeatedly stated to the plaintiff that the business was a steadily increasing business, and that it was a business of more than 12 sacks a week.

4. On the 5th of April 1875 the plaintiff, believing the said statements of the defendant to be true, agreed to purchase the said premises from the defendant for 500*l.*, and paid to him a deposit of 200*l.* in respect of the purchase.

5. On the 15th April the purchase was completed, an assignment of the lease executed, and the balance of the purchase money paid. On the same day the plaintiff entered into possession,

6. The plaintiff soon afterwards discovered that at the time of the negotiations for the said purchase by him and of the said agreement and of the completion thereof, the said business was and had long been a declining business; and at each of those times, and for a long time before, it had never been a business of more than 8 sacks a week. And the said premises were not of the value of 500*l.*, or of any saleable value whatever.

7. The defendant made the false representations hereinbefore mentioned well knowing them to be false, and fraudulently, with the intention of inducing the plaintiff to make the said purchase on the faith of them.

The plaintiff claims 1. damages.

[Title.]

*Statement of Defence.*

Defence.

1. The defendant says that at the time when he made the representations mentioned in the third paragraph of the statement of claim, and throughout the whole of the transactions between the plaintiff and defendant, and down to the completion of the purchase and the relinquishment by the defendant of the said shop and business to the plaintiff, the said business was an increasing business, and was a business of over 12 sacks a week. And the defendant denies the allegations of the sixth paragraph of the statement of claim.

2. The defendant repeatedly during the negotiations told the plaintiff that he must not act upon any statement or representation of his, but must ascertain for himself the extent and value of the said business. And the defendant handed to the plaintiff for this purpose the whole of his books, showing fully and truthfully all the details of the said business, and from which the nature, extent, and value thereof could be fully seen, and those books were examined for that purpose by the plaintiff, and by an accomptant on his behalf. And the plaintiff made the purchase in reliance upon his own judgment, and the result of his own inquiries and investigations, and not upon any statement or representation whatever of the defendant.

[Title.]

*Reply.*

Reply. The plaintiff joins issue upon the defendant's statement of defence.

No. 16.

GUARAN-  
TEE.In the High Court of Justice,  
Division.

187 . B. No.

Writ issued 3rd August, 1876.

Between *A.B.* and *C.D.* . . . . Plaintiffs,  
and  
*E.F.* and *G.H.* . . . . Defendants.

*Statement of Claim.*

Claim.

1. The plaintiffs are brewers, carrying on their business at under the firm of *X.Y. & Co.*

2. In the month of March 1872, *M.N.* was desirous of entering into the employment of the plaintiffs as a traveller and collector, and it was agreed between the plaintiffs and the defendants and *M.N.*, that the plaintiffs should employ *M.N.* upon the defendant entering the guarantee hereinafter mentioned.

3. An agreement in writing was accordingly made and entered into, on or about the 30th March 1872, between the plaintiffs and the defendants, whereby in consideration that the plaintiffs would employ *M.N.* as their collector the defendant agreed that he would be answerable for the due accounting by *M.N.* to the plaintiffs for and the due payment over by him to the plaintiffs of all moneys which he should receive on their behalf as their collector.

4. The plaintiffs employed *M.N.* as their collector accordingly, and he entered upon the duties of such employment, and continued therein down to the 31st of December 1873.

5. At various times between the 29th of September and the 25th of December 1873, *M.N.* received on behalf of the plaintiffs and as their collector sums of money from debtors of the plaintiffs amounting in the whole to the sum of 950*l.*; and of this amount *M.N.* neglected to account for or pay over to the plaintiffs sums amounting in the whole to 227*l.*, and appropriated the last-mentioned sums to his own use.

6. The defendant has not paid the last-mentioned sums, or any part thereof to the plaintiffs.

The plaintiffs claim :—

No. 18.

In the High Court of Justice,  
Division.

187 . B. No.

LANDLORD  
AND  
TENANT.

Writ issued 3rd August 1876.

Between *A.B.* . . . . Plaintiff,  
and  
*C.D.* . . . . Defendant.

*Statement of Claim.*

1. On the . . . day of . . . the plaintiff, by deed, let to the defendant a house and premises, No. 52, . . . Street, in the city of London, for a term of 21 years from the . . . day of . . . , at the yearly rent of 120*l.*, payable quarterly. Claim.

2. By the said deed the defendant covenanted to keep the said house and premises in good and tenantable repair.

3. The said deed also contained a clause of re-entry, entitling the plaintiff to re-enter upon the said house and premises, in case the rent thereby reserved whether demanded or not, should be in arrear for 21 days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

4. On the 24th June 187 . . . a quarter's rent became due, and on the 29th of September 187 . . . another quarter's rent became due; on the 21st October 187 . . . both had been in arrear for 21 days, and both are still due.

5. On the same 21st October 187 . . . the house and premises were not and are not now in good or tenantable repair, and it would require the expenditure of a large sum of money to reinstate the same in good and tenantable repair, and the plaintiff's reversion is much depreciated in value.

The plaintiff claims :—

1. Possession of the said house and premises.

2. . . . *l.* for arrears of rent.

3. . . . *l.* damages for the defendant's breach of his covenant to repair.

4. . . . *l.* for the occupation of the house and premises from the 29th of September 187 . . . to the day of recovering possession.

The plaintiff proposes that this action should be tried in London.

No. 20.

NEGLI-  
GENCE.In the High Court of Justice,  
Division.

187 . B. No.

Writ issued 3rd August 1876.

Between A.B. . . . . Plaintiff,  
and  
E.F. . . . . Defendant.

*Statement of Claim.*

Claim.

1. The plaintiff is a shoemaker, carrying on business at The defendant is a soap and candle manufacturer, of

2. On the 23rd May 1875, the plaintiff was walking eastward along the south side of Fleet Street, in the city of London, at about three o'clock in the afternoon. He was obliged to cross Street, which is a street running into Fleet Street at right angles on the south side. While he was crossing this street, and just before he could reach the foot pavement on the further side thereof, a two-horse van of the defendant's, under the charge and control of the defendant's servants, was negligently, suddenly, and without any warning, turned at a rapid and dangerous pace out of Fleet Street into Street. The pole of the van struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken, and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

The plaintiff claims l. damages.

[Title.]

*Statement of Defence.*

Defence.

1. The defendant denies that the van was the defendant's van, or that it was under the charge or control of the defendant's servant. The van belonged to Mr. John Smith, of , a carman and contractor employed by the defendant to carry and deliver goods for him; and the persons under whose charge and control the said van was were the servants of the said Mr. John Smith.

2. The defendant does not admit that the van was turned out of Fleet Street, either negligently, suddenly, or without warning, or at a rapid or dangerous pace.

3. The defendant says, that the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the van approaching him, and avoided any collision with it.

4. The defendant does not admit the statements of the third paragraph of the statement of claim.

[Title.]

*Reply.*

Reply.

The plaintiff joins issue upon the defendant's statement of defence.

## No. 22.

In the High Court of Justice,  
Division.

187 . B. No.

PROMIS-  
SORY NOTE.

Writ issued 3rd August 1876.

Between *A.B.* . . . . Plaintiff,  
and  
*E.F.* . . . . Defendant.

*Statement of Claim.*

1. The defendant on the . . . day of . . . made his pro- Claim.  
missory note, whereby he promised to pay to the plaintiff or his  
order . . . three months after date.

2. The note became due on the . . . day of . . . 1874,  
and the defendant has not paid it.

The plaintiff claims :—

The amount of the note and interest thereon to judgment.

The plaintiff proposes that this action should be tried in the  
county of

[Title.]

*Statement of Defence.*

1. The defendant made the note sued upon under the following Defence.  
circumstances :—The plaintiff and defendant had for some years  
been in partnership as coal merchants, and it had been agreed be-  
tween them that they should dissolve partnership, that the plaintiff  
should retire from the business, that the defendant should take over  
the whole of the partnership assets and liabilities, and should pay the  
plaintiff the value of his share in the assets after deducting the li-  
abilities.

2. The plaintiff thereupon undertook to examine the partnership  
books, and inquire into the state of the partnership assets and liab-  
ilities ; and he did accordingly examine the books, and make the said  
inquiries, and he thereupon represented to the defendant that the  
assets of the firm exceeded 10,000*l.*, and that the liabilities of the firm  
were under 3,000*l.*, whereas the fact was that the assets of the firm  
were less than 5,000*l.*, and the liabilities of the firm largely exceeded  
the assets.

3. The misrepresentations mentioned in the last paragraph induced  
the defendant to make the note now sued on, and there never was  
any other consideration for the making of the note.

[Title.]

*Reply.*

The plaintiff joins issue on the defence.

Reply.

## No. 24.

RECOVERY In the High Court of Justice,  
OF LAND. Common Pleas Division.

187 . B. No.

LANDLORD  
AND  
TENANT.

Writ issued 3rd August, 1876.

Between *A.B.* . . . . . Plaintiff,  
and  
*C.D.* . . . . . Defendant.

*Statement of Claim.*

- Claim. 1. On the . . . day of . . . the plaintiff let to the defendant a house, No. 52, . . . street, in the city of London, as tenant from year to year, at the yearly rent of 120*l.*, payable quarterly, the tenancy to commence on the . . . day of . . .
2. The defendant took possession of the house and continued tenant thereof until the . . . day of . . . last, when the tenancy determined by a notice duly given.
3. The defendant has disregarded the notice and still retains possession of the house.
- The plaintiff claims :—
1. Possession of the house.
  2. . . . . *l.* for mesne profits from the . . . day of . . .
- The plaintiff proposes that this action should be tried in London.

In the High Court of Justice,  
Common Pleas Division.

187 . No.

Between *A.B.* . . . . . Plaintiff,  
and  
*C.D.* . . . . . Defendant,  
(by original action,)

And between *C.D.* . . . . . Plaintiff,  
and  
*A.B.* . . . . . Defendant.  
(by counter-claim.)

- The defence and counter-claim of the above-named *C.D.*
- Defence. 1. Before the determination of the tenancy mentioned in the statement of claim, the plaintiff *A.B.*, by writing dated the . . . day of . . . , and signed by him, agreed to grant to the defendant *C.D.* a lease of the house mentioned in the statement of claim, at the yearly rent of 150*l.*, for the term of 21 years, commencing from the . . . day of . . . , when the defendant *C.D.*'s tenancy from year to year determined, and the defendant has since that date been and still is in possession of the house under the said agreement.
- Counter-claim. 2. By way of counter-claim the defendant claims to have the agreement specifically performed and to have a lease granted to him accordingly, and for the purpose aforesaid, to have this action transferred to the Chancery division.



In the High Court of Justice,		187	No.
Chancery Division.			
(Transferred by order dated		day of	.)
Between <i>A.B.</i>			Plaintiff,
	and		
<i>C.D.</i>			Defendant,
(by original action,)			
And between <i>C.D.</i>			Plaintiff,
	and		
<i>A.B.</i>			Defendant.
(by counter-claim.)			

The reply of the plaintiff *A.B.*

The plaintiff *A.B.* admits the agreement stated in the defendant *C.D.*'s statement of defence, but he refuses to grant to the defendant a lease, saying that such agreement provided that the lease should contain a covenant by the defendant to keep the house in good repair and a power of re-entry by the plaintiff upon breach of such covenant, and the plaintiff says that the defendant has not kept the house in good repair, and the same is now in a dilapidated condition.

**Reply.**

[Title.]

*Joinder of Issue.*

The defendant *C.D.* joins issue upon the plaintiff *A.B.*'s statement in reply.

No. 25.

In the High Court of Justice,  
Common Pleas Division.

Writ issued 3rd August 1876.

Between *A.B.* and *C.D.* . . . Plaintiffs,  
and  
*E.F.* . . . Defendant.

*Statement of Claim.*

1. *K.L.*, late of Sevenoaks in the county of Kent, duly executed his last will, dated the 4th day of April 1870, and thereby devised his lands at or near Sevenoaks, and all other his lands in the county of Kent, unto and to the use of the plaintiffs and their heirs, upon the trusts therein mentioned for the benefit of his daughters Margaret and Martha, and appointed the plaintiffs executors thereof.

**Claim.**

2. *K. L.* died on the 3rd day of January 1875, and his said will was proved by the plaintiffs in the Court of Probate on or about the 4th day of February 1875.

3. *K. L.* was at the time of his death seised in fee of a house at Sevenoaks, and two farms near there called respectively \_\_\_\_\_, the home farm containing 276 acres, and the Longton farm containing 700 acres, both in the county of Kent.

4. The defendant, soon after the death of *K. L.*, entered into possession of the house and two farms, and has refused to give them up to the plaintiff.

The plaintiffs claim :

1. Possession of the house and two farms :

2. *l.* for mesne profits of the premises from the death of *K. L.* till such possession shall be given.

The plaintiff proposes that this action should be tried in the county of Kent.

[Title.]

*Statement of Defence.*

Defence. 1. The defendant is the eldest son of *I. L.* deceased, who was the eldest son of *K. L.*, in the statement of claim named.

2. By articles bearing date the 31st day of May 1827 and made previous to the marriage of *K. L.* with Martha his intended wife, *K. L.*, in consideration of such intended marriage, agreed to settle the house and two farms in the statement of claim mentioned (and of which he was then seised in fee) to the use of himself for his life, with remainder to the use of his intended wife for her life, and after the survivor's decease, to the use of the heirs of the body of the said *K. L.* on his wife begotten, with other remainders over.

3. The marriage soon after took effect, *K. L.*, by deeds of lease and release, bearing date respectively the 4th and 5th of April 1828, after reciting the articles in alleged performance of them, conveyed the house and two farms to the use of himself for his life, with remainder to the use of his wife for her life, and after the decease of the survivor of them, to the use of the heirs body of *K. L.* on the said Martha to be begotten, with other remainders over.

4. There was issue of the marriage an only son Thomas L and two daughters. After the death of Thomas L, which took place in February 1864, *K. L.*, on the 3rd May 1864, executed a disentailing assurance, which was duly enrolled and thereby conveyed the house and two farms to the use of himself in fee.

[Title.]

*Reply.*

Reply. The plaintiffs join issue upon the defendant's statement of defence.

No. 27.

TRESPASS  
TO LAND.

In the High Court of Justice,  
Division.

187 . No.

Writ issued 3rd August 1876.

Between *A.B.* . . . . . Plaintiff,  
and  
*E.F.* . . . . . Defendant.

*Statement of Claim.*

Claim. 1. The plaintiff was on the 5th March 1876 and still is the owner

and occupier of a farm called Highfield Farm, in the parish of and county of

2. A private road, known as Highfield Lane, runs through a portion of the plaintiff's farm. It is bounded upon both sides by fields of the plaintiff's, and is separated therefrom by a hedge and ditch.

3. For a long time prior to the 5th March 1876 the defendant had wrongfully claimed to use the said road for his horses and carriages on the alleged ground that the same was a public highway, and the plaintiff had frequently warned him that the same was not a public highway, but the plaintiff's private road, and that the defendant must not so use it.

4. On the 5th March 1876 the defendant came with a cart and horse, and a large number of servants and workmen, and forcibly used the road, and broke down and removed a gate which the plaintiff had caused to be placed across the same.

5. The defendant and his servants and workmen on the same occasion pulled down and damaged the plaintiff's hedge and ditch upon each side of the road, and went upon the plaintiff's field beyond the hedge and ditch, and injured the crops there growing, and dug up and injured the soil of the road; and in any case the acts mentioned in this paragraph were wholly unnecessary for the assertion of the defendant's alleged right to use, or the user of the said road as a highway.

The plaintiff claims :

1. Damages for the wrongs complained of.
2. An injunction restraining the defendant from any repetition of any of the acts complained of.
3. Such further relief as the nature of the case may require.

[Title.]

*Statement of Defence.*

1. The defendant says that the road was and is a public highway for horses and carriages; and a few days before the 5th March 1876 the plaintiff wrongfully erected the gate across the road for the purpose of obstructing and preventing, and it did obstruct and prevent the use of the road as a highway. And the defendant on the said 5th March 1876 caused the said gate to be removed, in order to enable him lawfully to use the road by his horses and carriages as a highway.

Defence.

2. The defendant denies the allegations of the fifth paragraph of the statement of claim, and says that neither he nor any of his workmen or servants did any act, or used any violence other than was necessary to enable the plaintiff lawfully to use the highway.

[Title.]

*Reply.*

The plaintiff joins issue upon the defendant's statement of defence.

Reply.

## APPENDIX (D).

No. 28.

*Form of Demurrer.*

In the High Court of Justice,  
Division:

A.B. v. C.D.

The defendant [plaintiff] demurs to the [plaintiff's statement of complaint *or* defendant's statement of defence, *or* of set-off, *or* of counter-claim], [*or* to so much of the plaintiff's statement of complaint as claims . . . . *or* as alleges as a breach of contract the matters mentioned in paragraph 17, *or* as the case may be], and says that the same is bad in law on the ground that [*here state a ground of demurrer*] and on other grounds, sufficient in law to sustain this demurrer.

No. 29.

*Memorandum of Entry of Demurrer for Argument.*

1874. B. No.

In the High Court of Justice,  
Division.

A.B. v. C.D.

Enter for the argument the demurrer of \_\_\_\_\_ to \_\_\_\_\_  
X. Y.,  
Solicitor for the plaintiff [*or, &c.*]

## APPENDIX (D.) (a)

## FORMS OF JUDGMENT.

1. *Default of Appearance and Defence in Case of Liquidated Demand.*

1876. B. No.

In the High Court of Justice,  
Division.

Between A.B. . . . . Plaintiff,  
and  
C.D. and E.F. . . . . Defendants.

30th November 1876.

The defendants [*or* the defendant C.D.] not having appeared to the writ of summons herein [*or not having delivered any statement of defence*], it is this day adjudged that the plaintiff recover against the said defendant \_\_\_\_\_ l., and costs, to be taxed.

(a) This appendix is a copy of Appendix D to Judicature Act, 1875.

2. *Judgment in default of Appearance in Action for Recovery of Land.*

[Title, &c.]

30th November 1876.

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff recover possession of the land in the said writ mentioned.

3. *Judgment in default of Appearance and Defence after Assessment of Damages.*

1876. B. No.

In the High Court of Justice,  
Division.

Between *A.B.* and *C.D.* . . . . . Plaintiffs,  
and  
*E.F.* and *G.H.* . . . . . Defendants.

30th November 1876.

The defendants not having appeared to the writ of summons herein [or not having delivered a statement of defence], and a writ of inquiry, dated 1876, having been issued directed to the sheriff of to assess the damages which the plaintiff was entitled to recover, and the said sheriff having by his return dated the 1876, returned that the said damages have been assessed at £., it is adjudged that the plaintiff recover £., and costs, to be taxed.

4. *Judgment at Trial by Judge without a Jury.*

[Year, letter, and number.]

Division.

day of 18 .

[If in Chancery Division, name of Judge.]

Between *A.B.* . . . . . Plaintiff,  
and  
*C.D.*, *E.F.*, and *G.H.* . . . . . Defendants.

This action coming on for trial [the day of and] this day, before in the presence of counsel for the plaintiff and the defendants [or, if some of the defendants do not appear, for the plaintiff and the defendant *C.D.*, no one appearing for the defendants *E.F.* and *G.H.*, although they were duly served with notice of trial as by the affidavit of filed the day of appears,] upon hearing the probate of the will of , the answers of the defendants, *C.D.*, *E.F.*, and *G.H.*, to interrogatories, the admission in writing, dated and signed by [Mr. the solicitor for] the plaintiff *A.B.* and by [Mr. the solicitor for] the defendant *C.D.*, the affidavit of filed the

day of \_\_\_\_\_, the affidavit of \_\_\_\_\_ filed the \_\_\_\_\_ day of \_\_\_\_\_, the evidence of \_\_\_\_\_ taken on their oral examination at the trial, and an exhibit marked X., being an indenture dated, &c. and made between [parties], and what was alleged by counsel on both sides : This court doth declare, &c.

And this court doth order and adjudge, &c.

### 5. Judgment after Trial by a Jury.

[Title, &c.]

15th November 1876.

The action having on the 12th and 13th November 1876 been tried before the Honourable Mr. Justice \_\_\_\_\_ and a special jury of the county of \_\_\_\_\_, and the jury having found [*state findings as in officer's certificate*], and the said Mr. Justice \_\_\_\_\_ having ordered that judgment be entered for the plaintiff for \_\_\_\_\_ l. and cost of suit [*or as the case may be*] : Therefore it is adjudged that the plaintiff recover against the defendant \_\_\_\_\_ l. and \_\_\_\_\_ l. for his costs of suit [*or that the plaintiff recover nothing against the defendant, and that the defendant recover against the plaintiff \_\_\_\_\_ l. for his costs of defence, or as the case may be*].

### 6. Judgment after Trial before Referee.

[Title, &c.]

30th November 1876.

The action having on the 27th November 1876 been tried before X.Y. Esq. an official [*or special*] referee; and the said X.Y. having found [*state substance of referee's certificate*], it is this day adjudged that

### 7. Judgment upon Motion for Judgment.

[Title, &c.]

30th November 1876.

This day before \_\_\_\_\_ Mr. X. of counsel for the plaintiff [*or as the case may be*], moved on behalf of the said \_\_\_\_\_ [*state judgment moved for*], and the said Mr. X. having been heard of counsel for \_\_\_\_\_ and Mr. Y. of counsel for \_\_\_\_\_ the court adjudged

## APPENDIX (E.) (a).

## FORMS OF PRÆCIFE.

1. *Fieri facias*.

1876. B. No.

In the High Court of Justice,  
Division.Between *A.B.* . . . . . Plaintiff,  
and*C.D.* and others . . . . . Defendants.

Seal a writ of fieri facias directed to the sheriff of . . . . . to  
levy against *C.D.* . . . . . the sum of . . . . . £. and interest  
thereon at the rate of . . . . . £. per centum per annum from the  
day of . . . . . [and . . . . . £. costs] to . . . . .

Judgment [*or order*] dated . . . . . day of . . . . .  
[Taxing master's certificate, dated . . . . . day of . . . . .].

*X.Y.*, Solicitor for [*party on whose  
behalf writ is to issue.*]

2. *Elegit*.

187 . B. No.

In the High Court of Justice,  
Division.Between *A.B.* . . . . . Plaintiff,  
and*C.D.* and others . . . . . Defendants.

Seal a writ of elegit directed to the sheriff of . . . . . against  
of . . . . . in the county of . . . . . for not paying  
to *A.B.* the sum of . . . . . £., together with interest thereon, from  
the . . . . . day of . . . . . [and the sum of . . . . . £. for  
costs,] with interest thereon at the rate of 4£. per centum per annum.

Judgment [*or order*] dated . . . . . day of . . . . . 18 . . . . .  
[Taxing master's certificate, dated . . . . . day of . . . . . 18 . . . . .]

*X.Y.*,  
Solicitor for

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(a) This is a copy of Appendix E to the Judicature Act, 1875.

3. *Venditioni Exponas.*

187 . B. No.

In the High Court of Justice,  
Division.

Between *A.B.* . . . . . Plaintiff,  
and  
*C.D.* and others . . . . . Defendants.

Seal a writ of venditioni exponas directed to the sheriff of  
to sell the goods and of *C.D.* taken under a writ of fieri  
facias in this action tested day of .  
X. Y.,  
Solicitor for .

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4. *Fieri Facias de Bonis Ecclesiasticis.*

187 . B. No.

In the High Court of Justice,  
Division.

Between *A.B.* . . . . . Plaintiff,  
and  
*C.D.* . . . . . Defendant.

Seal a writ of fieri facias de bonis ecclesiasticis directed to the  
bishop [*or* archbishop, *as the case may be*] of to levy  
against *C.D.* the sum of £  
Judgment [*or* order] dated day of .  
[Taxing master's certificate, dated day of .]  
X. Y.,  
Solicitor for .

---

5. *Sequestrari Facias de Bonis Ecclesiasticis.*

187 . B. No.

In the High Court of Justice,  
Division.

Between *A.B.* . . . . . Plaintiff,  
and  
*C.D.* and others . . . . . Defendants.

Seal a writ of sequestrari facias directed to the Lord Bishop  
of against *C.D.* for not paying to *A.B.* the sum  
of £

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6. *Writ of Sequestration.*

187 . B. No.

In the High Court of Justice,  
Division.Between *A.B.* . . . . Plaintiff,  
and  
*C.D.* and others . . . Defendants.Seal a writ of sequestration against *C.D.* for not  
at the suit of *A.B.* directed to [*names of Commissioners*].  
Order dated . . . day of .7. *Writ of Possession.*

187 . B. No.

In the High Court of Justice,  
Division.Between *A.B.* . . . . Plaintiff,  
and  
*C.D.* and others . . . Defendants.Seal a writ of possession directed to the sheriff of . . . to  
deliver possession to *A.B.* of . . .  
Judgment dated . . . day of . . .8. *Writ of Delivery.*

187 . B. No.

In the High Court of Justice,  
Division.Between *A.B.* . . . . Plaintiff,  
and  
*C.D.* and others . . . Defendants.Seal a writ of delivery directed to the sheriff of . . . to make  
very to *A.B.* of . . .9. *Writ of Attachment.*

187 . B. No.

In the High Court of Justice,  
Division.Between *A.B.* . . . . Plaintiff,  
and  
*C.D.* and others . . . Defendants.Seal in pursuance of order dated . . . day of  
an attachment directed to the sheriff of . . . against *C.D.* for  
not delivering to *A.B.*

## APPENDIX (F.) (a).

## FORMS OF WRITS.

1. *Writ of Fieri Facias.*

In the High Court of Justice,  
Division.

187 . B. No.

Between *A.B.* . . . . . Plaintiff,  
and  
*C.D.* and others . . . . . Defendants.

Victoria, by the grace of God of the United Kingdom of Great  
Britain and Ireland Queen, Defender of the Faith.

To the sheriff of . . . . . greeting.

We command you that of the goods and chattels of *C.D.* in your bailiwick you cause to be made the sum of . . . . . *l.* and also interest thereon at the rate of . . . . . *l.* per centum per annum from the . . . . . day of . . . . . *(b)* which said sum of money and interest were lately before us in our High Court of Justice in a certain action [*or* certain actions, *as the case may be*] wherein *A.B.* is plaintiff and *C.D.* and others are defendants [*or* in a certain matter there depending intituled "*In the matter of E.F.*" *as the case may be*] by a judgment [*or* order, *as the case may be*] of our said Court, bearing date the . . . . . day of . . . . . adjudged [*or* ordered, *as the case may be*] to be paid by the said *C.D.* to *A.B.*, together with certain costs in the said judgment [*or* order, *as the case may be*] mentioned, and which costs have been taxed and allowed by one of the taxing masters of our said Court at the sum of . . . . . *l.* as appears by the certificate of the said taxing master, dated the . . . . . day of . . . . . And that of the goods and chattels of the said *C.D.* in your bailiwick you further cause to be made the said sum of . . . . . *l.* [costs] together with interest thereon at the rate of *4l.* per centum per annum from the . . . . . day of . . . . . *(c)* and that you have that money and interest before us in our said Court immediately after the execution hereof to be paid to the said *A.B.* in pursuance of the said judgment [*or* order, *as the case may be*]. And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

Witness, &c.

(a) This is a copy of Appendix F. to the Judicature Act, 1875.

(b) Day of the judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be.

(c) The date of the certificate of taxation. The writ *must* be so moulded as to follow the substance of the judgment or order (*Schroeder v. Cleugh*, 46 L. J. C. P. 365).

2. *Writ of Elegit.*

187 . B. No.

In the High Court of Justice,  
Division.

Between *A.B.*

and

*C.D.* and others

Plaintiff,

Defendants.

Victoria, by the grace of God of the United Kingdom of Great  
Britain and Ireland Queen, Defender of the Faith.

To the sheriff of

greeting.

Whereas lately in our High Court of Justice in a certain action  
[or certain actions, *as the case may be*] there depending, wherein *A.B.*  
is plaintiff and *C.D.* and others are defendants [or in a certain mat-  
ter there depending, intituled "In the matter of *E.F.*," *as the case*  
*may be*] by a judgment [or order, *as the case may be*] of our said Court  
made in the said action [or matter, *as the case may be*], and bearing  
date the                      day of                      , it was adjudged

[or ordered, *as the case may be*] that *C.D.* should pay unto *A.B.* the  
sum of                      £., together with interest thereon after the

rate of                      £. per centum per annum from the  
day of                      , together also with certain costs as in the

said judgment [or order, *as the case may be*] mentioned, and which  
costs have been taxed and allowed by                      one of

the taxing masters of our said Court, at the sum of                      £. as  
appears by the certificate of the said taxing master, dated the

day of

And

afterwards the said *A.B.* came into our said Court, and according to  
the statute in such case made and provided, chose to be delivered to  
him all the goods and chattels of the said *C.D.* in your bailiwick,  
except his oxen and beasts of the plough, and also all such lands,  
tenements, rectories, tithes, rents, and hereditaments, including lands  
and hereditaments of copyhold or customary tenure, in your bailiwick  
as the said *C.D.*, or any one in trust for him was seised or possessed  
of on the                      day of                      in the year of our

Lord                      (a) or at any time afterwards, or over which the said  
*C.D.* on the said                      day of                      or at

any time afterwards had any disposing power which he might with-  
out the assent of any other person exercise for his own benefit, to  
hold to him the said goods and chattels as his proper goods and  
chattels, and to hold the said lands, tenements, rectories, tithes, rents,  
and hereditaments respectively, according to the nature and tenure  
thereof, to him and to his assigns, until the said two several sums of

£. and

£., together with interest

upon the said sum of                      £., at the rate of                      £.  
per centum per annum from the said                      day

of                      and on the said sum of                      £.  
(costs) at the rate of 4£. per centum per annum from the

day of                      shall have been levied. There-  
fore we command you that without delay you cause to be delivered  
to the said *A.B.* by a reasonable price and extent all the goods and  
chattels of the said *C.D.* in your bailiwick, except his oxen and

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(a) The day on which the judgment or order was made.

## APPENDIX (F.) (a).

## FORMS OF WRITS.

1. *Writ of Fieri Facias.*

In the High Court of Justice,  
Division.

187 . B. No.

Between *A.B.* . . . . . Plaintiff,  
and  
*C.D.* and others . . . . . Defendants.

Victoria, by the grace of God of the United Kingdom of Great  
Britain and Ireland Queen, Defender of the Faith.

To the sheriff of . . . . . greeting.

We command you that of the goods and chattels of *C.D.* in your bailiwick you cause to be made the sum of . . . . . *l.* and also interest thereon at the rate of . . . . . *l.* per centum per annum from the . . . . . day of . . . . . (*b*) which said sum of money and interest were lately before us in our High Court of Justice in a certain action [*or* certain actions, *as the case may be*] wherein *A.B.* is plaintiff and *C.D.* and others are defendants [*or* in a certain matter there depending intituled "In the matter of *E.F.*" *as the case may be*] by a judgment [*or* order, *as the case may be*] of our said Court, bearing date the . . . . . day of . . . . . adjudged [*or* ordered, *as the case may be*] to be paid by the said *C.D.* to *A.B.*, together with certain costs in the said judgment [*or* order, *as the case may be*] mentioned, and which costs have been taxed and allowed by one of the taxing masters of our said Court at the sum of . . . . . *l.* as appears by the certificate of the said taxing master, dated the . . . . . day of . . . . . And that of the goods and chattels of the said *C.D.* in your bailiwick you further cause to be made the said sum of . . . . . *l.* [*costs*] together with interest thereon at the rate of *4l.* per centum per annum from the . . . . . day of . . . . . (*c*) and that you have that money and interest before us in our said Court immediately after the execution hereof to be paid to the said *A.B.* in pursuance of the said judgment [*or* order, *as the case may be*]. And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

Witness, &c.

(a) This is a copy of Appendix F. to the Judicature Act, 1875.

(b) Day of the judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be.

(c) The date of the certificate of taxation. The writ *must* be so moulded as to follow the substance of the judgment or order (*Schroeder v. Cleugh*, 46 L. J. C. P. 365).

2. Writ of *Elegit*.

187 . B. No.

In the High Court of Justice,  
Division.Between *A.B.*

and

Plaintiff,

*C.D.* and others

Defendants.

Victoria, by the grace of God of the United Kingdom of Great  
Britain and Ireland Queen, Defender of the Faith.

To the sheriff of

greeting.

Whereas lately in our High Court of Justice in a certain action [or certain actions, *as the case may be*] there depending, wherein *A.B.* is plaintiff and *C.D.* and others are defendants [or in a certain matter there depending, intituled "*In the matter of E.F.*," *as the case may be*] by a judgment [or order, *as the case may be*] of our said Court made in the said action [or matter, *as the case may be*], and bearing date the                      day of                      , it was adjudged

[or ordered, *as the case may be*] that *C.D.* should pay unto *A.B.* the sum of                      £., together with interest thereon after the rate of                      £. per centum per annum from the

day of                      , together also with certain costs as in the said judgment [or order, *as the case may be*] mentioned, and which costs have been taxed and allowed by                      one of

the taxing masters of our said Court, at the sum of                      £. as appears by the certificate of the said taxing master, dated the

day of                      . And afterwards the said *A.B.* came into our said Court, and according to the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C.D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick as the said *C.D.*, or any one in trust for him was seised or possessed of on the                      day of                      in the year of our

Lord                      (a) or at any time afterwards, or over which the said *C.D.* on the said                      day of                      or at

any time afterwards had any disposing power which he might without the assent of any other person exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of

£. and                      £., together with interest upon the said sum of                      £., at the rate of                      £.

per centum per annum from the said                      day of                      and on the said sum of                      £.

(costs) at the rate of 4£. per centum per annum from the day of                      shall have been levied. Therefore we command you that without delay you cause to be delivered to the said *A.B.* by a reasonable price and extent all the goods and chattels of the said *C.D.* in your bailiwick, except his oxen and

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(a) The day on which the judgment or order was made.

beasts of the plough, and also all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick as the said *C.D.*, or any person or persons in trust for him was or were seised or possessed of on the said day of (a) or at any time afterwards, or over which the said *C.D.* on the said day of (a), or at any time afterwards had any disposing power which he might without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said *A.B.*, as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns until the said two several sums of £. and £. together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us in our Court aforesaid, immediately after the execution thereof, under your seals, and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness ourselves at Westminster, &c.

### 3. *Writ of Venditioni Exponas.*

1875. B. No.

In the High Court of Justice,  
Division.

Between *A.B.* . . . . . Plaintiff,  
and  
*C.D.* and others . . . . . Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of greeting.

Whereas by our writ we lately commanded you that of the goods and chattels of *C.D.* [*here recite the fieri facias to the end*]. And on the day of you returned to us in the Division of our High Court of Justice aforesaid, that by virtue of the said writ to you directed you had taken goods and chattels of the said *C.D.* to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers. Therefore we, being desirous that the said *A.B.* should be satisfied his money and interest aforesaid, command you that you expose to sale and sell, or cause to be sold, the goods and chattels of the said *C.D.*, by you in form aforesaid taken, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before us in our said Court of Justice immediately after the execution hereof, to be paid to the said *A.B.* And have there then this writ.

Witness ourself at Westminster, the day of  
in the year of our reign.

(a) The day on which the decree or order was made.

## 1875. B. No.

Between A.B. . . . Plaintiff,  
and  
C.D. and others . . . Defendants.

5. *Writ of Fieri Facias to the Archbishop de bonis Ecclesiasticis during the vacancy of a Bishop's See.*

Victoria [*&c. as in the preceding form*]: To the Right Reverend Father in God [*John*] by Divine Providence Lord Archbishop of Canterbury, Primate of all England and Metropolitan, greeting: We command you, that of the ecclesiastical goods of *C.D.*, clerk in the diocese of \_\_\_\_\_ which is within the province of Canterbury, as ordinary of that church, the episcopal see of \_\_\_\_\_ now being vacant, you cause to be made [*&c., conclude as in preceding form*].

6. *Writ of Sequestrari Facias de bonis Ecclesiasticis.*

1875. B. No.

In the High Court of Justice,  
Division.

Between *A.B.* . . . . Plaintiff,  
and  
*C.D.* and others . . . . Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the Right Reverend Father in God [*John*] by Divine permission Lord Bishop of greeting: Whereas we lately commanded our sheriff of that he should omit not by reason of any liberty of his county, but that he should enter the same, and cause [to be made, *if after the return to a fieri facias, or delivered, if after the return to an elegit, &c., and in either case recite the former writ.*] And whereupon our said sheriff of on [or "at a day past"] returned to us in the division of our said Court of Justice, that the said *C.D.* was a beneficed clerk; that is to say, rector of the rectory [or vicar of the vicarage] and parish church of in the county of , and within your diocese, and that he had not any goods or chattels, or any lay fee in his bailiwick [*here follow the words of the sheriff's return*]. Therefore, we command you that you enter into the said rectory [or vicarage] and parish church of , and take and sequester the same into your possession, and that you hold the same in your possession until you shall have levied the said *l.* and interest aforesaid, of the rents, tithes, rentcharges in lieu of tithes, oblations, obventions, fruits, issues, and profits thereof, and other ecclesiastical goods in your diocese of and belonging to the said rectory [or vicarage] and parish church of and to the said *C.D.* as rector [or vicar] thereof to be rendered to the said *A.B.*, and what you shall do therein make appear to us in our said Court immediately after the execution hereof, and have you there then this writ. Witness ourself at Westminster, the day of in the year of our Lord

7. *Writ of Possession.*

187 . B. No.

In the High Court of Justice,  
Division.

Between *A.B.* . . . . Plaintiff,  
and  
*C.D.* and others . . . . Defendants.

Victoria, to the sheriff of , greeting: Whereas lately in our High Court of Justice, by a judgment of the Division of the same Court [*A.B.* recovered] or [*E.F.* was ordered to deliver to *A.B.*] possession of all that with the appurtenances in your bailiwick: Therefore, we command you that you omit not by reason of any liberty of your county, but that you enter



the same, and without delay you cause the said *A.B.*, to have possession of the said land and premises with the appurtenances. And in what manner you have executed this our writ make appear to the Judges of the Division of our High Court of Justice immediately after the execution hereof, and have you there then this writ. Witness, &c.

---

8. *Writ of Delivery.*

187 . B. No.

In the High Court of Justice,  
Division.

Between *A.B.* . . . . Plaintiff,  
and  
*C.D.* and others . . . Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of greeting: We command you, that without delay you cause the following chattels, that is to say [*here enumerate the chattels recovered by the judgment for the return of which execution has been ordered to issue*], to be returned to *A.B.*, which the said *A.B.* lately in our recovered against *C.D.* [*or C.D. was ordered to deliver to the said A.B. in an action in the division of our said Court.\** And we further command you, that if the said chattels cannot be found in your bailiwick, you distrain the said *C.D.* by all his lands and chattels in your bailiwick, so that neither the said *C.D.* nor any one for him do lay hands on the same until the said *C.D.* render to the said *A.B.* the said chattels; and in what manner you shall have executed this our writ make appear to the Judges of the Division of our High Court of Justice, immediately after the execution hereof, and have you there then this writ. Witness, &c.

---

The Like, but instead of a Distress until the Chattel is returned, commanding the Sheriff to levy on Defendant's Goods the assessed Value of it.

[*Proceed as in the preceding form until the\*, and then thus:*] And we further command you, that if the said chattels cannot be found in your bailiwick, of the goods and chattels of the said *C.D.* in your bailiwick you cause to be made l. [*the assessed value of the chattels*], and in what manner you shall have executed this our writ make appear to the Judges of the Division of our High Court of Justice at Westminster, immediately after the execution hereof, and have you there then this writ. Witness, &c.

---

9. *Writ of Attachment.*

187 . B. No.

In the High Court of Justice,  
Division.

Between *A.B.* . . . . Plaintiff,  
and  
*C.D.* and others . . . Defendants.

Victoria, &c.

To the sheriff of greeting.

We command you to attach *C.D.* so as to have him before us in the Division of our High Court of Justice wheresoever the said Court shall then be, there to answer to us, as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you. Witness, &c.

10. *Writ of Sequestration.*

187 . B. No.

In the High Court of Justice,  
Division.

Between *A.B.* . . . . Plaintiff,  
and  
*C.D.* and others . . . Defendants.

Victoria, &c.

To [*names of not less than four Commissioners*] greeting.

Whereas lately in the Division of our High Court of Justice in a certain action there depending, wherein *A.B.* is plaintiff and *C.D.* and others are defendants [*or, in a certain-matter then depending, intituled "In the matter of *E.F.*," as the case may be*] by a judgment [*or order, as the case may be*] of our said Court made in the said action [*or matter*], and bearing date the day of 187 , it was ordered that the said *C.D.* should [pay into Court to the credit of the said action the sum of *l.*, *or, as the case may be*]. Know ye, therefore, that we, in confidence of your prudence and fidelity, have given, and by these presents do give to you, or any three or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever of the said *C.D.*, and to collect, receive, and sequester into your hands not only all the rents and profits of his said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estates whatsoever; and therefore we command you, any three or two of you, that you do at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements, and real estates of the said *C.D.*, and that you do collect, take, and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels, and personal estate, and detain and keep

the same under sequestration in your hands until the said *C.D.* shall [pay into Court to the credit of the said action the sum of £. or, as the case may be,] clear his contempt, and our said Court make other order to the contrary. Witness, &c.

The following extracts from R. M. T. 1869, regulating the practice as to arrest by judge's order after judgment, may as well be here inserted.

By r. 1, M. T. 1869, all applications to commit to prison under it are, in the first instance, to be made by summons before a judge, which must specify the date and other particulars of the judgment or order for non-payment of which the application is made, together with the amount due, and be indorsed with the particulars required by r. 73 of H. T. 1853.

By r. 2, the service of a summons, where practicable, must be personal; but if it appear to the judge that reasonable efforts have been made to effect personal service, and either that the summons has come to the knowledge of the debtor, or that he wilfully evade service, an order may be made as if personal service had been effected, upon such terms as to the judge may seem fit.

By r. 3, proof of the means of the debtor must, whenever practicable, be given by affidavit; but if it appear to the judge, either before or at the hearing, that a *vivâ voce* examination, either of the debtor or of any other person, or the production of any document is necessary or expedient, an order may be made commanding the attendance of any such person before the judge, at a time and place to be therein mentioned, for the purpose of being examined on oath touching the matter in question, or for the production of any such document, subject to such terms and conditions as to the judge may seem fit. The disobedience to any such order is deemed a contempt of court, and punishable accordingly.

By r. 4, the order of committal (which may be in the form A in the schedule, or to the like effect), must, before delivery to the sheriff, be indorsed with the particulars required by rule 73 of H. T. 1853 (*a*). Concurrent orders may be issued for execution in different counties. The sheriff and officer are entitled to the same fees in respect thereof as are now payable upon a *ca. sa*.

By r. 5, upon payment of the sum or sums mentioned in the order (including the sheriff's fees in like manner as upon a *ca. sa.*), the debtor is entitled to a certificate in the form B, *infra*, or to the like effect, signed by the attorney in the cause of the creditor, or signed by the creditor, and attested by an attorney on his behalf, or a justice of the peace.

Then follow rules regulating the practice as to arrest of a defendant before judgment.

(*a*) This is the old rule as to the indorsement of the solicitor's address on a writ of execution, which was similar to O. 42, r. 11, *ante*, p. 165.

## A.

*Order for Arrest after Judgment (ante, p. 174).*

Upon hearing, &c. [*Christian and surname of the debtor and of the party claiming*], I do order that the said *A.B.* be, for default in payment of the debt hereinafter mentioned, committed to prison for the term of (six) weeks from the date of his arrest, including the day of such date, or until he shall pay *l.*, being the amount of [*an instalment due to the said C.D. upon*] or a judgment of the court of (or an order made by *l.*) bearing date the day of *l.*, together with *l.*, for costs of this order, and sheriffs' fees for the execution thereof. And I order that the sheriff of (Middlesex) do take the said *A.B.* for the purpose aforesaid, if he shall be found within his bailiwick.

Dated, &c.

## B.

*Certificate after Arrest that Debt satisfied (ante, p. 174).*

I certify that *A.B.*, now in the gaol of *l.* upon an order of the Honourable Mr. Justice *l.*, at the suit of *C.D.*, for non-payment of a debt of *l.* pounds, has satisfied the said debt, together with the costs mentioned in the said order, and sheriffs' fees.

Dated, &c.

*E.F.*, of, &c.

Attorney of the said *C.D.*

or

*C.D.*, of, &c.

Witness to the signature of *C.D.*,

*G.H.*, of, &c., his attorney,

or

*J.K.* of, &c.

Justice of the Peace for *l.*

## C.

*Order for arrest of Defendant before Judgment.*

Upon reading the affidavit of, &c., I do order that the defendant be arrested and imprisoned for *l.* months from the date of his arrest, including the day of such date, unless and until he shall sooner deposit in court the sum of *l.* by way of security, or give to the plaintiff a bond executed by him (a) and two sufficient sureties in the penalty of *l.* (b) or some other security satisfactory to the plaintiff; that he will not go out of England without the leave of the court [*or that any sum recovered against him in this action shall be paid, or that he shall be rendered to prison*]. And I order that the Sheriff of (Middlesex) do, within one calendar month from the date hereof, including the day of such date, and not afterwards, take the defendant for the purpose aforesaid, if he shall be found in the said Sheriff's bailiwick.

(a) With leave of a judge there may be more than two sureties.

(b) When the action is for a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract, this must be sufficient to include the probable costs of the action, and the terms must be those in italics.

## APPENDIX (G).

## CIRCUITS.

By Order in Council, dated 5th February 1876, made under Judicature Act 1875, s. 23, it is ordered, amongst other things, that

2. The circuits shall be respectively constituted as specified in the 2nd column of the schedule thereto, and the places where assizes may be held shall be the places at which assizes have hitherto been held.

3. Nothing in this order shall affect the provisions of an Order in Council made on the 4th day of May 1864, relating to the division of the county of Lancaster into three divisions, or the provisions of an Order in Council made on the 10th day of June 1864, as amended by an Order in Council made on the 9th day of July 1864, relating to the division of the county of York into two divisions.

4. The North and South Wales Circuit shall be divided into two divisions, the North-Wales division and the South-Wales division; and such divisions shall be respectively constituted as specified in the 2nd column of the said schedule.

5. The county of Surrey shall not be included in any circuit, but commissions shall be issued not less often than twice in every year for the discharge of civil and criminal business therein.

## SCHEDULE.

Name of Circuit.	Constitution of Circuit.
Northern Circuit.	County of Westmoreland [assize town, Appleby (a)]. County of Cumberland [assize town, Carlisle (a)]. County of Lancaster [assize towns, Lancaster, Manchester, and Liverpool. See O. 3, <i>supra</i> (a)].
North Eastern Circuit.	County of Northumberland [assize town, Newcastle (a)]. County of the Town of Newcastle-upon-Tyne [assize town, Newcastle]. County of Durham [assize town, Durham (a)]. County of York [assize towns, York, for the North and East Ridings, Leeds, for the West Riding. See O. 3, <i>supra</i> (a)]. County of the City of York [assize town, York].
Midland Circuit.	County of Lincoln [assize town, Lincoln (a)]. County of the City of Lincoln [assize town, Lincoln (a)]. County of Nottingham [assize town, Nottingham (a)]. County of the Town of Nottingham [assize town, Nottingham (a)]. County of Derby [assize town, Derby (a)]. County of Warwick [assize town, Warwick (a)]. County of Leicester [assize town, Leicester (a)]. Borough of Leicester [assize town, Leicester (a)]. County of Northampton [assize town, Northampton (a)]. County of Rutland [Oakham, assize town (a)]. County of Buckingham [Aylesbury, assize town (a)]. County of Bedford [assize town, Bedford (a)].
South Eastern Circuit.	County of Norfolk [assize town, Norwich (a)]. County of the City of Norfolk [assize town, Norwich (a)]. County of Suffolk [assize towns, Bury St. Edmunds in the summer; Ipswich in the spring (a)]. County of Huntingdon [assize town, Huntingdon (a)]. County of Cambridge [assize town, Cambridge (a)]. County of Hertford [assize town, Hertford (a)]. County of Essex [assize town, Chelmsford (a)]. County of Kent [assize town, Maidstone (a)]. County of Sussex [assize town, Lewes (a)].

(a) The parts within brackets are not in the schedule, but see O. 2, *supra*.

Name of Circuit.	Constitution of Circuit.
Oxford Circuit.	County of Berks [assize town, Reading (a)]. County of Oxford [assize town, Oxford (a)]. County of Worcester [assize town, Worcester (a)]. County of the City of Worcester [assize town, Worcester (a)]. County of Stafford [assize town, Stafford (a)]. County of Salop [assize town, Shrewsbury (a)]. County of Hereford [assize town, Hereford (a)]. County of Monmouth [assize town, Monmouth (a)]. County of Gloucester [assize town, Gloucester (a)]. County of the City of Gloucester [assize town, Gloucester (a)].
Western Circuit.	County of Southampton [assize town, Winchester (a)]. County of Wilts [assize towns, Devizes in spring; Salisbury in summer (a)]. County of Dorset [assize town, Dorchester (a)]. County of the City of Exeter [Exeter, assize town (a)]. County of Devon [assize town, Exeter (a)]. County of Cornwall [assize town, Bodmin (a)]. County of Somerset [assize towns, Taunton in spring; Wells in summer (a)]. County of the City of Bristol [assizes held at Bristol (a)].
North and South Wales Circuit.	(a) <i>North Wales Division.</i> County of Montgomery [assize towns, Welchpool in the spring, Newtown in the summer (a)]. County of Merioneth [assize town, Dolgelly (a)]. County of Carnarvon [assize town, Carnarvon (a)]. County of Anglesea [assize town, Beaumaris (a)]. County of Denbigh [assize town, Ruthen (a)]. County of Flint [assize town, Mold (a)]. County of Chester [assize town, Chester (a)].  (b) <i>South Wales Division.</i> County of Glamorgan [assize towns, Cardiff in spring; Swansea in summer (a)]. County of Carmarthen [assize town, Carmarthen (a)]. County of the Borough of Carmarthen [assize town, Carmarthen]. County of Pembroke [assize town, Haverfordwest (a)]. County of the Town of Haverfordwest [assize town, Haverfordwest (a)]. County of Cardigan [assize town, Cardigan (a)]. County of Brecknock [assize town, Brecon (a)]. County of Radnor [assize town, Presteign (a)].

## APPENDIX (H).

*Order in Council as to District Registries.*

By Order in Council, dated 12th August 1875, it is ordered as follows:—That there shall be district registrars in the places of Liverpool, Manchester, and Preston, and the district registrar at Liverpool of the High Court of Admiralty, and the district prothonotary at Liverpool of the Court of Common Pleas at Lancaster, shall be and are hereby appointed the district registrar in Liverpool, and the district prothonotary at Manchester of the said Court of Common Pleas, shall be and is hereby appointed district registrar

(a) The parts within brackets are not in the schedule, but see O. 2, *supra*.

in Manchester (a) ; and the district prothonotary at Preston of the said Court of Common Pleas, shall be and is hereby appointed the district registrar at Preston ; and that the district for each such place shall be the district now assigned to each such district prothonotary, under the provisions and authority of "The Common Pleas at Lancaster Amendment Act, 1869."

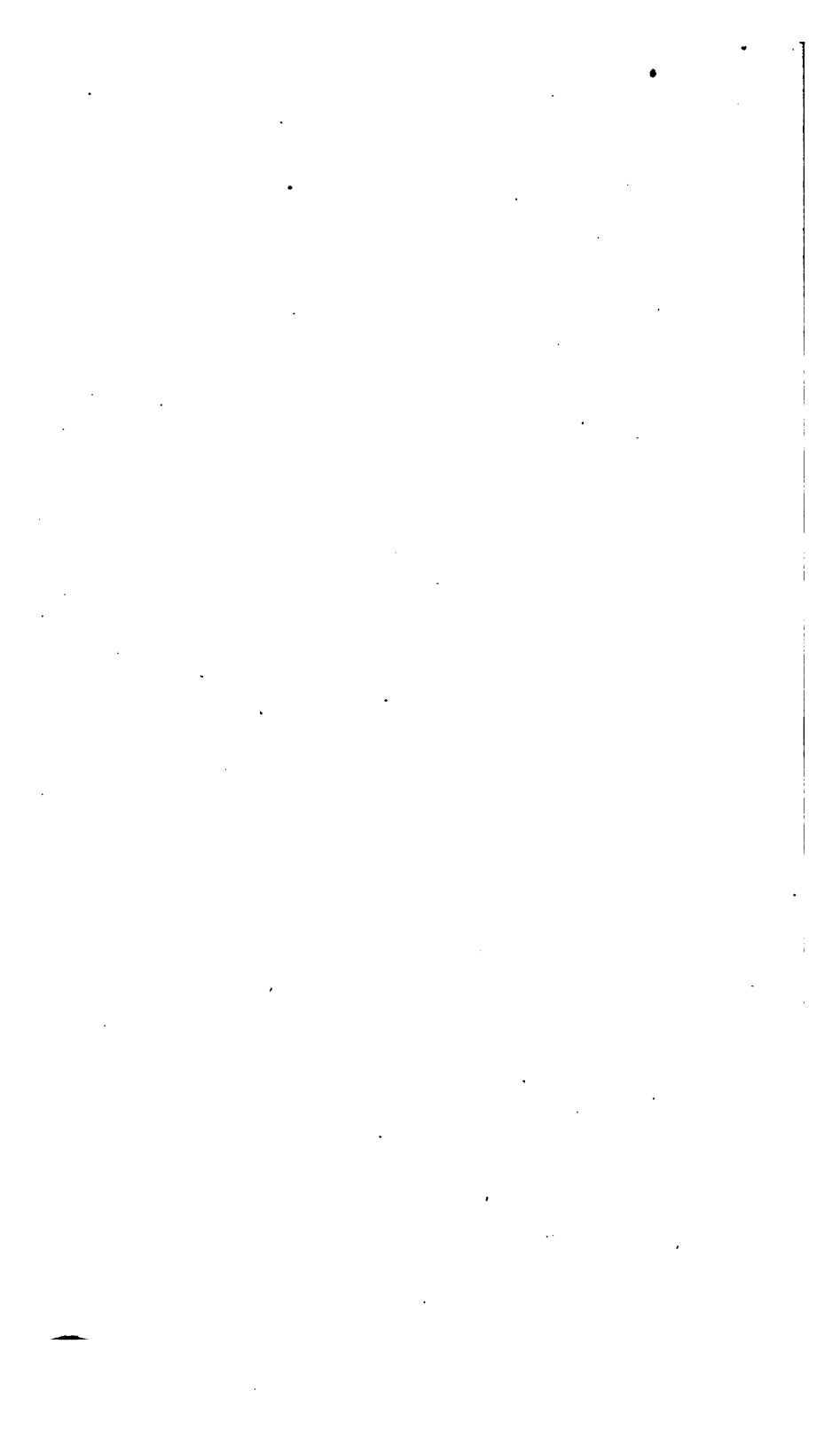
That there shall be a district registrar in Durham, and that the district prothonotary of the Court of Pleas at Durham shall be and is hereby appointed the district registrar in Durham ; and that the district shall be the district, for the time being, of the County Court holden at Durham.

That in the places mentioned in the schedule annexed, there shall be district registrars, and that the registrar of the County Court held in any such place shall be and is hereby appointed the district registrar in such place, and that the district for each such place shall be the district, for the time being, of the County Court holden at such place.

## SCHEDULE.

Bagnor.	Kingston-on-Hull.
Barnsley.	King's Lynn.
Barnstaple.	Leeds.
Bedford.	Leicester.
Birkenhead.	Lincoln.
Birmingham.	Lowestoft.
Boston.	Maidstone.
Bradford.	Newcastle-upon-Tyne
Briggewater.	Newport, Monmouthshire.
Brighton.	Newport, Isle of Wight.
Bristol.	Newtown.
Bury St. Edmunds.	Northampton.
Cambridge.	Norwich.
Cardiff.	Nottingham.
Carlisle.	Oxford.
Carmarthen.	Pembroke Docks.
Cheltenham.	Peterborough.
Chester.	Poole.
Colchester.	Portsmouth.
Derby.	Ramsgate.
Dewsbury.	Rochester.
Dover.	Sheffield.
Dorchester.	Shrewsbury.
Dudley.	Southampton.
East Stonehouse.	Stockton-on-Tees.
Exeter.	Sunderland.
Gloucester.	Swansea.
Great Grimsby.	Truro.
Great Yarmouth.	Totnes.
Halifax.	Wakefield.
Hanley.	Walsal.
Hartlepool.	Whitehaven.
Hereford.	Wolverhampton.
Huddersfield.	Worcester.
Ipswich.	York.

(a) The district prothonotary at Manchester having died, another order in council, dated 9 December, 1876, has been made.





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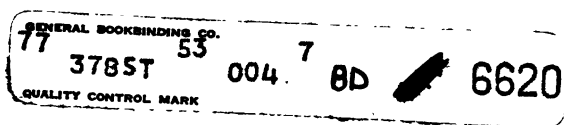
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